IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1470

DELTA AIR LINES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta Int'l Airport
Atlanta, Georgia 30320

JAMES W. CALLISON
SIDNEY F. DAVIS
ROBERT S. HARKEY
Attorneys for Petitioner

Of Counsel:

ROBERT REED GRAY, Esq.
HALE RUSSELL GRAY SEAMAN & BIRKETT
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

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Delta Air Lines, Inc. ("Delta") herewith petitions this Court to issue a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered on January 20, 1978, which affirms a decision of the Civil Aeronautics Board ("Board") which ordered Delta to submit to arbitration a seniority integration dispute growing out of the merger of Northeast Airlines, Inc. ("Northeast") into Delta.

OPINIONS BELOW

The opinion of the Court of Appeals, review of which is sought here, is not yet reported, but is set forth at page 1a of the Appendix to this petition. Also pertinent and necessary to the consideration of this case are (1) the unreported order and opinion of the Court of Appeals in the case of *Committee of Former Northeast Stewardesses* v. *CAB* (D. C. Cir. May 27, 1975) which is set forth at

page 1b of the Appendix, (2) the Board's order of which review was sought in the Court of Appeals (*Delta-Northeast Merger Case*, Order 76-9-129, dated September 29, 1976) which is set forth at page 1c of the Appendix, and (3) the Board's prior orders in the case, Orders 75-1-6 and 73-9-42, set forth at pages 1d and 1e, respectively, of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on January 20, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 49 U.S.C. § 1486(f).

QUESTIONS PRESENTED

(1) Whether, under applicable principles of administrative law, the Civil Aeronautics Board may order an air carrier to arbitrate a seniority integration dispute under the Board's Labor Protective Provisions (imposed in airline mergers) when the request for arbitration undisputedly came many months after the time limits for seeking arbitration had run, when the Board itself recognized the importance of enforcing the time limits in order to avoid labor strife, and when there was no evidence in the record to support the Board's reasons for ordering arbitration.

(2) Whether the Court of Appeals erred in applying an "abuse of discretion" standard in reviewing the decision of the Civil Aeronautics Board instead of the standard of whether the Board had adhered to the record and its own decisional criteria.

STATUTES AND REGULATIONS INVOLVED

Although not directly related to the issues in this case, Section 408 of the Federal Aviation Act of 1958, as

amended ("Act"), 49 U.S.C. § 1378, is the statutory authority for the Labor Protective Provisions ("LPP's") imposed by the Board in this and other cases having to do with mergers of air carriers. *See Kent* v. *CAB*, 204 F.2d 263 (2nd Cir. 1953). Section 408 is set out at page 1f of the Appendix ("App."). There are no regulations involved, but the LPP's imposed by the Board as a condition to its approval of the merger of Northeast into Delta, when the merger was approved by the Board in May of 1972, are directly in issue in this case. Because of the similarity of the LPP's to statutory and regulatory provisions and their pertinence to this case, the LPP's and related portions of the Board's Orders 72-4-31/32[1] and Orders 72-5-73/74 are included in the Appendix.[2]

STATEMENT OF THE CASE

As is explained in greater detail below, in this case Delta was ordered by the Board to submit to arbitration a dispute concerning the integration of seniority lists for the stewardesses of Delta and Northeast following the merger of the two companies in August of 1972, notwithstanding the facts that (1) the Board's LPP's called for submission of disputes to arbitration and decision within 90 days, and (2) it was (and is) undisputed that the Committee seeking arbitration did not request it until the spring of 1974.

The merger of Delta and Northeast was approved by the CAB pursuant to § 408 of the Act in Orders 72-5-

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[1] Orders 72-4-31/32 (App. 1g) approved the merger of Allegheny Airlines and Mohawk Airlines. In the *Allegheny-Mohawk case*, the Board indicated that it also would apply its reasoning in that case with regard to the LPP's to the *Delta-Northeast case*. (App. 49, footnote 25). In the order approving the *Delta-Northeast case* (App. 1h), the Board incorporated by reference its statements regarding the LPP's made in the *Allegheny-Mohawk case*. (App. 2h).

[2] The LPP's themselves appear at page 1i of the Appendix.

73/74 dated April 24, 1972 (App. 1h), and was consummated on August 1, 1972. In connection with its approval of the merger, the Board imposed the LPP's which are attached as Appendix 1 to Order 72-5-73 (App. 1i). Among other things the LPP's require the surviving carrier to provide for the integration of seniority lists "in a fair and equitable manner" and for the arbitration of disputes arising under the LPP's, including those related to seniority integration. (App. 1i-2i, 11i)

These LPP's are substantially the same as the standard LPP's imposed by the Board in the *United-Capital Merger Case*, 33 CAB 307 (1961), and subsequent merger cases, except for several changes in the arbitration procedures which were designed to ensure expedited presentation and resolution of disputes. The Board said:

> "Expedited hearings and decisions will be expected, and *a decision shall be rendered within 90 days after the controversy arises*, unless an extension of time is mutually agreeable to all parties." [emphasis added] (App. 11i)

In reliance of the total package of conditions attached by the Board to the approval of the merger, including the LPP's containing the *expedited* arbitration procedures, Delta accepted the terms of the merger imposed by the Board and Northeast's certificates were transferred to Delta on August 1, 1972. See Order 72-8-1.

In July of 1972, prior to the effective date of the merger, representatives of the two carriers and the Transport Workers Union ("TWU") met in connection with the integration of the stewardess seniority lists. (At that time, the TWU was still the collective bargaining representative of the Northeast stewardesses under the Railway Labor Act.) At this meeting TWU insisted that it should negotiate the lists with Delta, but Delta stated that representative committees of the two stewardess

groups should be selected for this purpose. Subsequently, committees were selected by both stewardess groups and negotiations began. The Northeast committee was not represented by any TWU personnel during these negotiations.

The negotiations extended over a period of approximately two months, but eventually resulted in an inability of the two groups to agree upon an integrated list, primarily because of the insistence of the Northeast stewardesses on a straight date of hire integration.[3] The Northeast representatives then withdrew from the negotiations. At this point Delta concluded that its responsibility under the LPP's required that it develop a fair and equitable seniority list, based upon the ideas that it had been put forward by both stewardess groups during the meetings, subject to any arbitration that might be invoked by any dissatisfied employees.

Delta did not receive complaints from *any* stewardesses, former Northeast or original Delta, after the integrated list was published, although the TWU had requested arbitration *before* the integrated list was published. Delta responded to TWU's request by pointing out that the TWU was not authorized to represent the former Northeast stewardesses under the LPP's merely by virtue of its former representation under the Railway Labor Act, citing CAB precedent to this effect and emphasizing that Delta had not received complaints from individual stewardesses or been provided with any evidence that TWU had been authorized by any employees

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[3] With respect to this contention, which was later embraced by the Committee of Former Northeast Stewardesses, it is interesting to note the court's statement in *Outland* v. *CAB*, 109 U.S. App. D.C. 90, 284 F.2d 224, 228 (D.C. Cir. 1960), that "The contention that length of service could control or even that it should always be the dominant factor in seniority is not consistent with experience nor with judicial attitudes toward the subject." [citations omitted]

to represent them for LPP purposes. Still no complaints were filed.

In January of 1973, TWU filed a petition with the CAB seeking an order compelling Delta to arbitrate the stewardess seniority lists. In its answer filed on February 15, 1973, Delta responded essentially as it had to the TWU itself, stating that the TWU had not shown that it represented any employees under the LPP's, that because of the break-down in negotiations between the stewardess representatives Delta had been forced to integrate the lists in what it considered to be a fair and equitable manner, subject to requests for arbitration from dissatisfied employees, and that it had received no such requests from any employees.

In May of 1973, the TWU filed a supplement to its petition setting out statements to TWU from five former Northeast stewardesses, advising that these stewardesses were dissatisfied with the integrated seniority list. Delta reponded by stating that Delta itself still had not received any complaints or requests for arbitration *and pointing out that by this time it had been many months since the effective date of the merger and since Delta had published the integrated list so that any complaints filed at this point would not be timely under the LPP's.*

In September of 1973, the Board issued Order 73-9-42 in which it denied the TWU petition. The Board summarized Delta's July 2, 1973 answer as follows:

> "In its answer, Delta states that it still has not had a request from any former Northeast stewardesses . . . for arbitration of a seniority problem; that the TWU has not informed Delta of any authorization to represent any former Northeast employees in seniority matters; *that the Board should reject TWU's petition on the grounds that no dispute has been properly submitted to Delta for arbitration within a reasonable period of time after the dispute arose . . . .*" [emphasis added] (App. 5e)

Then the Board ruled:

> "We will dismiss the TWU petition on the alternate grounds that (1) no showing has been made which warrants intervention on the Board's part, and (2) TWU is not a 'representative' of the former Northeast employees for purposes of invoking the provisions for arbitration contained in our labor protective provisions merely because it was the collective bargaining representative of those employees prior to the merger." (App. 5e)

The Board refrained from deciding the question of timeliness raised by Delta, saying in a footnote that this and other questions were appropriate "for resolution in the context of negotiation or an arbitration proceeding and, accordingly, we do not decide them here." The Board did not, however, give any indication of how the question of timeliness should be handled or otherwise provide any guidance should the question be submitted to arbitration. Nor did it order arbitration in the event that a further request was made. *The TWU did not seek review of this order and thereafter Delta received no further request from the TWU for arbitration.*

It was not until April of 1974—some 6 months after the Board had denied TWU's petition, approximately 18 months after the integrated seniority list had been published and over 20 months after the effective date of the merger—that Delta received a request from an attorney representing three former Northeast stewardesses (the "Committee"), supported by written authorizations, requesting negotiation or arbitration of the stewardess seniority list. These stewardesses claimed to have authority to represent other former Northeast stewardesses, although written authorizations from the other stewardesses were not furnished at that time. Delta denied the request on the basis that it came many months after the expiration of the time limits set out in the LPP's and

tha. to enter into arbitration at such a late date would thwart the major purpose of the LPP's, *i.e.*, to avoid labor strife and unrest.

Following Delta's response to their request, the former Northeast stewardesses waited almost two *more* months before taking any further action. Then in June of 1974, they filed a petition with the CAB seeking an order directing Delta to arbitrate. After approximately six *more* months, the Board issued Order 75-1-6. In this order, the Board failed to deal with the policy arguments advanced by Delta for denying the request for arbitration on the basis that it was grossly late. Instead the Board decided to dismiss the petition, directing the petitioners to the courts, because the Board "ordinarily ought not to entertain petitions requesting that it direct air carriers to proceed to arbitration under the Board's standard labor protective provisions." As the basis of its ruling, the Board cited its lack of expertise in labor matters, the possibility of an appeal should it order arbitration, and problems with enforcement of any order directing arbitration. The Committee sought review of this order pursuant to 49 U.S.C. § 1486 and the Court of Appeals summarily reversed and remanded for a "decision on the merits," citing *Carey* v. *O'Donnell*, 165 U.S. App. D.C. 46, 506 F.2d 107 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 1110, in which the court had held that the Board has exclusive jurisdiction to decide matters arising under its LPP's. *Committee of Former Northeast Stewardesses* v. *Civil Aeronautics Board, supra.* (App. 1b)

In its Order 76-9-129 in response to the court's reversal and remand, the Board recognized and strongly embraced the time limits argument that Delta has consistently maintained since the Committee first requested arbitration. After reciting the basic facts, the Board said:

> "*Ordinarily, the Board would consider the above recital of facts, if true, to be dispositive of the question of timeliness.* As we pointed out in the *Allegheny-Mohawk Merger Case, supra*, delays in reaching arbitration prolong labor disputes and undermine harmonious labor relations. *Open-ended availability of arbitration can only ferment further strife and is an invitation for abuse of the system adopted by the Board for the protection of employees* affected by a merger, or a large-sale [sic] acquisition. *Moreover, it is clear that the Board's arbitration provision contemplates a speedy resolution of disputes.*" [emphasis added] (Order 76-9-129, p. 4) (App. 6c)

The Board went on to conclude, however, that because of what is called "highly unusual circumstances and conflicting assertions attending the history of this particular seniority integration" and supposed deficiencies in the record, "we are unable to definitively resolve . . . the merits of Delta's argument that the arbitration provisions are untimely invoked."

Therefore, the Board decided " . . . to order arbitration, but to include in the arbitrator's mandate a jurisdictional question" as to the timeliness issue. The Board made it quite clear, however, that it considered the timeliness question as one which *it* normally would decide.

> "We should *emphasize* that our action with respect to the timeliness issue is predicated upon the particular circumstances present and the record before us. *Our normal inclination, given an adequate record not requiring further proceedings, would be to resolve the issue at this stage.* However, this is not, to all appearances, such a case." [emphasis added] (Order 76-9-129, p. 6, App. 8c)

Delta sought review in the Court of Appeals pursuant to 49 U.S.C. § 1486, on the basis that the Board had failed to adhere to its own decisional criteria, *i.e.*, that if the stated facts were true, the Board itself would have dismissed the petition because the request for arbitration

was not timely filed. Delta showed that the facts were undisputed (indeed, Delta accepted the facts pleaded by the Committee) and that application of the Board's reasoning to these facts required a decision dismissing the petition on the merits. In its decision on review, the Court of Appeals concluded that "The basic question before this Court is whether the Board abused its discretion by referring to the arbitrator the procedural issue of timeliness of the request for arbitration, rather than deciding that issue on the record before it." (App. 2a) Applying this standard, the Court concluded that the Board had not abused its discretion and affirmed the Board's order.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the administration of Labor Protective Provisions in airline merger cases, as well as questions concerning the requirement that an administrative agency adhere to the evidence of record and to its own decisional criteria. In addition it raises questions as to the proper standard to be applied in reviewing such cases by courts of appeals. The standard of review utilized by the Court of Appeals in this case conflicts with the standard used by the First Circuit and with the standard used by the District of Columbia Circuit in other cases. The conflict should be resolved by this Court. Additionally, because the Board and the Court of Appeals so clearly departed from the accepted application of appropriate standards of administrative law in a case which has vital precedent value with respect to other merger cases, this Court's power of supervision is called for to correct the serious errors below.

1. The Board's Reasons for Ordering Arbitration Were Not Supported by the Record and the Requirement to Arbitrate Was Contrary to the Decisional Criteria Stated by the Board.

There is no more fundamental principal of administrative law than the requirement that the agency must adhere to the evidence of record. See *Braniff Airways, Inc.* v. *CAB*, 126 U.S. App. D.C. 399, 379 F.2d 453, 456 (D.C. Cir. 1967). The Board's decision in this case is based, however, *not* on the clear and undisputed *facts* in the record, but on vague statements concerning the history of the dispute and factors which the Board said "appeared" to be relevant or pertinent. After stating that the recited facts ordinarily would be dispositive of the issue of timeliness and recognizing the policy reasons for enforcing the time limits, the Board reasoned as follows:

> "On the other hand, we cannot ignore the highly unusual circumstances and conflicting assertions attending the history of this particular seniority list integration dispute. This history is described in some detail in Order 73-9-42 (served September 13, 1973) and Order 75-1-6, *supra*, the pertinent portions of which we incorporate herein by reference, and need not be repeated here at length. Briefly, the dispute was under active negotiation between the former Northeast stewardesses, more precisely, their assumed representative, the Transport Workers Union, since prior to the consummation of the merger; the negotiations failed; pursuit of arbitration by the Transport Workers Union, on behalf of the stewardesses, foundered because of problems with respect to the TWU's authority to represent the Northeast stewardesses (see Order 73-9-42, *supra*); and subsequent to TWU's withdrawal, a group of individual stewardesses took up the task of pursuing the arbitration remedy, culminating in the instant proceeding.

"Moreover, while the record is rife with documents detailing various aspects of this continuing history, the material is in the form of numerous—and apparently conflicting—unsworn allegations of a factual, legal and equitable nature, involving various aspects of labor-management relations as well as other matters. *Relevant to the ultimate issue of timeliness raised by Delta appears to be the question of the representational capacity of various individuals and groups, and the TWU*, involved in the negotiations and the quest for arbitration of the underlying seniority integration dispute. *Also pertinent may be Delta's actual knowledge of dissatisfaction with the seniority list* adopted by it following the failure of negotiations and the form that such dissatisfaction took, whether formal complaints or otherwise. *Furthermore, there is in our mind some question as to the extent that Delta's own actions in this ongoing controversy may have served to defeat, through delay, legitimate rights to arbitration under the Board's labor protective provisions.*" [emphasis added] (Order 76-9-129, pp. 4-5) (App. 6c-7c)

Orders 73-9-42 (App. 1d) and 75-1-6 (App. 1e) do not, however, support the Board's conclusions and the factors cited in the second paragraph quoted above are nothing more than the Board's repetition of the *arguments* made by the Committee which are legally irrelevant. The Board's "brief history" of the case implies that the TWU's efforts "foundered" for some reason with which the Board had no connection and that the Committee's efforts were merely an *unbroken* continuation of the TWU effort. The undisputed facts are that the Board dismissed the TWU's request for an order directing arbitration and that Delta received no request from the Committee for many months thereafter.

In Order 73-9-42, which dealt with the TWU's request for arbitration, the Board found nothing "unusual" about Delta's refusal to submit the stewardess seniority aribtration matter to arbitration with the TWU. To the contrary, the Board held in no uncertain terms that the TWU had no right to demand arbitration merely because it had been the representative of the Northeast stewardesses under the Railway Labor Act prior to the merger and that it must present evidence of its representative capacity under the LPP's in order to invoke arbitration. The Board said:

> "We will dismiss the TWU petition on the alternate grounds that (1) no showing has been made which warrants intervention on the Board's part, and (2) TWU is not a 'representative' of the former Northeast employees for purposes of invoking the provisions for arbitration contained in our labor protective provisions merely because it was the collective bargaining representative of those employees prior to the merger." (Order 73-9-42, p. 4, App. 5e)

The TWU did *not* appeal this order which was issued in September of 1973 or come forward with any evidence of representation despite the Board's statement that it could obtain arbitration by doing so. (See Order 73-9-42, p. 4, App. 6e) It was not until March of 1974 that the Committee's lawyer contacted Delta with a request to arbitrate and it was April of 1974 before the lawyer submitted the evidence of representation clearly required under Order 73-9-42.

In Order 75-1-6, in which the Board initially dealt with the Committee's request for arbitration, the Board cited *no* unusual circumstances or conflicting assertions on the issue of timeliness. It merely stated that for reasons having to do with the Board's lack of expertise in labor matters the petitioners ". . . should resort to the courts to the extent that they seek an order directing a carrier to proceed to arbitration." (App. 6d) There was no statement whatsoever of conflicting assertions which would at *that* time have precluded the Board from deciding the question of timeliness.

The Board's position in Order 75-1-6 cannot be squared with its decision in the order now at issue. Under the last order a decision on timeliness "normally" is one for the Board which would be decided when the petition for arbitration is filed. (Order 76-9-129, p. 6, App. 8c) Delta asked the Board to make just that decision when the Committee's petition was filed and the Board refused to make it in Order 75-1-6, although it now says that under the facts *in this case* it would have decided that the request for arbitration was barred by the time limits, absent the "unusual circumstances." Nothing has changed since the filing of the petition and Delta's response, which consti-tuted the record when the Board issued its Order 75-1-6, except that the Committee appealed and the Court of Appeals remanded the case to the Board for "a decision on the merits." The Board failed, however, to comply with the court's mandate and instead manufactured additional reasons not to render a consistent decision on the merits. The latest reasons are not supported by Orders 73-9-42 and 75-1-6 as the Board states, and they are not supported by the record.

In its filing with the Board, the Committee maintained that it was the successor to the TWU as representative of the former Northeast stewardesses and that, accordingly, it should not be barred by the LPP time limits because of the early efforts of the TWU to seek arbitration and the Board apparently was swayed by this argument. Even assuming, however, that there was any relationship between the TWU and the Committee, the undisputed facts, *indeed the facts as stated by the Committee itself in its original petition, show that the LPP time limits were grossly violated even if the time is measured only from the date that the TWU petition was denied by the Board.*

The Committee itself did not allege that Delta had received *any* request to arbitrate except for the TWU request and the request of the Committee filed many months after the Board dismissed TWU's petition. Accordingly, *there was absolutely no dispute and there were no "conflicting assertions" concerning the facts related to the issue of timeliness.* These undisputed facts show that *the very first contact* to Delta *by the Committee* came almost 20 months after the merger effective date, almost 18 months after Delta advised all flight attendants of the integrated seniority list, almost 6 months after the Board dismissed the TWU petition, over 5 months after the Committee was advised by the TWU that it would not proceed and almost 4 months after the Committee retained counsel. When the LPP's, which were distributed to each of the former Northeast stewardesses prior to the merger, call for submission of disputes after 20 days and decision within 90 days after a dispute arises, there can be no question that, as a matter of law, a dispute submitted over 18 months from the date the dispute arose is barred. *Even after the Committee retained legal counsel there was no contact for almost 4 months, a period which in itself violated the LPP requirements.*

The Board simply ignored the clear and uncontested facts in the record to reach a decision ordering arbitration when in the same order the Board said that if the facts were uncontested it would dispose of the case itself in Delta's favor. The ruling of the Board also is contrary to the Board's statement that "We should emphasize that . . . given an adequate record not requiring further proceedings . . . ," the Board would ". . . resolve the issue at this stage." (Order 76-9-129, p. 6, App. 8c) It was shown that the relevant facts in the record were complete and undisputed. Thus the Board improperly delegated the issue to an arbitrator under its own standard for delegation.

As the Court of Appeals said in *Braniff Airways, Inc.* v. *CAB, supra*:

> "None of [the] salutary principles of judicial restraint requires the court to accept meekly 'administrative pronouncements clearly at variance with established facts.' *NLRB* v. *Morganton Full Fashioned Hosiery Co.*, 214 F.2d 913, 916 (4th Cir. 1956). Yet this is precisely what we have found upon inspection of the record and comparison with the Board's opinion. *We cannot ignore the fundamental contradiction between the Board's assertion of fact and what the record clearly reveals.*" [emphasis added] (379 F.2d 453 at 463.)

Similarly, in this case the Board's assertion of a lack of facts necessary to decide the issue of timeliness cannot stand inspection of the record (specifically the facts stated by the Committee in its petition and accepted by Delta). The complete and uncontested facts are set forth and, under the Board's own statements in its order, these facts are "dispositive of the question of timeliness." The Board's statements that it was delegating the case to an arbitrator because of deficiencies in the record quite simply are contradicted by the record.

Moreover, the inconsistency between the Board's decisional bases (that the stated facts, if true, would be dispositive and that the Board would decide the case itself if t' record did not require further hearings) and the actual record (which shows that the stated facts are uncontradicted and that no further hearings are necessary) and the inconsistency with the Orders 73-9-42 and 75-1-6 cannot stand under the decision in *City of Lawrence* v. *CAB*, 343 F.2d 583 (1st Cir. 1965). The following statements of the Court in that case could be applied equally to this case:

> "Apart from these internal inconsistencies, the Board's decision, without explanation, reverses an earlier case involving essentially the same questions [citation omitted]; *departs from the reasoning and holding in other regional airport cases* [citations omitted] *and is inconsistent with other aspects of the same proceeding.* . . . Such action is arbitrary and capricious and must be reversed." [emphasis added] (343 F.2d at 588)

Finally, as the District of Columbia Circuit itself said in *Continental Air Lines, Inc.* v. *CAB*, 143 U.S. App. D.C. 330, 443 F.2d (D.C. Cir. 1971):

> "In our reviewing role, *it is peculiarly appropriate for us to take the Board at its own word as to what it is doing, and to scrutinize the result in terms of that process.*" [emphasis added] (443 F.2d at 756)

The Board's action in this case cannot withstand such scrutiny. The Board said (indeed emphasized) that it would decide the case if the record were not deficient and said that if the recited facts were true it would dispose of the case. The Board did not do, however, what it *said* it was doing.

2. The Court of Appeals Erred in Applying an "Abuse of Discretion" Standard in Reviewing the Decision of the Board Instead of a Standard of Whether the Board Had Adhered to the Record and its Own Decisional Criteria.

The Court of Appeals viewed the issue presented to it as follows:

> "In our review, we must initially determine whether the Board has discretion to delegate procedural issues arising under the LPP's, such as timeliness of arbitration complaints, to an arbitrator. If the Board does have such discretion and acted within its scope, we must then decide, on the basis of the administrative record, whether the Board abused its discretion." (App. 6a)

In so conceiving the issue, the Court entirely misunderstood Delta's contentions and the true issue before the Court. Delta did not and does not dispute that the Board

has discretion to order arbitration of issues arising under the LPP's, including procedural issues such as timeliness. What Delta contended was that the Board had failed to abide by its own reasoning and criteria in deciding to send *this case* to arbitration on the issue of timeliness. Thus the issue presented was not whether the Board had discretion to order arbitration, or whether it abused its discretion, but whether, as the court said in the *Continental Air Lines* case, *supra*, the Board was doing what it said it was doing.

Even in its conclusion that it must "carefully examine the administrative record" (App. 8a), the Court misconceived its scope of review. It concluded that it must determine "first, whether the Board considered the relevant factors, and second, whether it made 'a clear error of judgment.'" (App. 8a) The true issue presented had nothing to do with whether the Board had made an error of judgment, it had only to do with the question of whether the Board had in fact applied its own decisional criteria to the undisputed facts in the case.

As the Court of Appeals said:

> "The undisputed facts in the record before the Board do reveal that the Committee made no formal protest to Delta until many months after the Board's September 1973 decision on TWU's representational capacity."

The Court sidestepped the question of whether the Board's reasoning as applied to these undisputed facts required dismissal of the Committee's petition by concluding:

> ". . . that the Board, by stating its 'normal inclination' to decide such issues, was [not] thereby setting a standard for itself from which it could not deviate without being found to have engaged in arbitrary and capricious action.
>
> • • •

> "Rather, we believe that the Board was recognizing that it had discretion either to resolve or to delegate the timeliness question, depending upon the adequacy of the record before it and the perceived need for specialized knowledge in labor matters to deal with the question." (App. 9a-10a)

The Court's conclusion in this regard is squarely in conflict with the First Circuit's decision in *City of Lawrence* v. *CAB*, *supra*, and the District of Columbia Circuit's decisions in the *Braniff Airways* and *Continental Air Lines* cases, *supra*, in which the courts analyzed the Board's actions in terms of deciding whether the Board had adhered to its own reasoning process as related to the facts shown by the record. Moreover, in examining the record and the Board's stated reasons for sending the case to arbitration, the Court itself engaged in the same kind of "boot strap" reasoning that the Board had used, which reasoning ignored the undisputed facts and relied upon speculation which was inconsistent with the Board's prior orders.

The Board relied on three factors in sending the case to arbitration. These were:

(1) The supposedly unresolved "question of the representational capacity of the various individuals and groups, and the TWU, involved in the negotiations and the quest for arbitration."

(2) "Delta's actual knowledge of dissatisfaction with the seniority list."

(3) "Delta's own actions in this ongoing controversy [which] may have served to defeat, through delay, legitimate rights to arbitration under the Board's labor protective provisions." (Order 76-9-129, pp. 4-5, App. 7c)

Both the Board and the Court ignored (1) the Board's previous orders in which it had clearly rejected the TWU's representational capacity absent evidence thereof which,

undisputedly, was never submitted; (2) the Board's failure in any previous order to indicate any concern with Delta's supposed knowledge of dissatisfaction (particularly when the Board itself has recognized on numerous occasions that by its very nature the integration process will leave some employees dissatisfied); and (3) that there was absolutely no evidence in the record that Delta had done anything to delay any request for arbitration by any party, and neither the Board nor the Court could point to any such evidence.

With respect to the latter point, the Court could only say that "Furthermore, whether or not such action was legally justified, it cannot be denied that Delta's demands for formal representational authorization delayed both TWU's and the Committee's pursuit of the arbitration remedy." (App. 11a) Such reasoning is circular and avoids the very question which should have been decided by the Court, and had in fact previously been decided by the Board, *i.e.*, whether Delta's position "was legally justified." The Board had specifically held that it was justified in Order 73-9-42 in which it made it clear that Delta was absolutely correct in demanding evidence of TWU's representational capacity. See Order 73-9-42 at pp. 4-5 (App. 5e-7e). In view of this finding, it is inconceivable that Delta could then be held to have delayed requests to arbitrate by not honoring the TWU's request absent evidence of its representational capacity.

Thus the Court, as well as the Board, placed an impossible burden on Delta which was inconsistent with prior Board orders, the reasoning in the very order in which the Board ordered arbitration, and the undisputed facts.

The Court said:

> "The outcome of this case might have been different if there had been no factual basis in the record for the issues raised by the Board or if the legal aspects of those issues had previously been settled." (App. 10a-11a)

As is pointed out above, the legal aspects of the representational question *had* previously been settled by the Board in Order 73-9-42 and this decision undercut the first and third factors on which the Board had based its decision to order arbitration. The second factor, that Delta may have had actual knowledge of dissatisfaction, is clearly irrelevant in any legal sense. As the Board has often acknowledged, it is impossible to integrate seniority lists without there being some dissatisfaction. This does not mean, however, that Delta must, without a request, submit the "dissatisfaction" to arbitration. To hold otherwise would ignore the most essential traditional principles of Anglo-American jurisprudence. It would seem that nothing could be clearer than that a claim cannot be held cognizable by a court, an agency or an adverse party until it is actually submitted, and that the adverse party cannot be held accountable prior to such submission. This would be equivalent to holding that a statute of limitations is tolled if a prospective defendant has knowledge of a possible claim against him.

Thus the Court not only utilized the wrong standards, it incorrectly analyzed the factors relied upon by the Board and the evidence and legal principles applicable thereto. As a result, Delta has been forced into a lengthy and expensive arbitration process that still has not been concluded and questions which adversely affect relations between the former Northeast and original Delta flight attendants which should have been resolved many years ago have been resurrected, resulting in labor strife and unrest. Thus, the basic purpose of the LPP's, to avoid labor unrest and strife, has been thwarted.

CONCLUSION

For the reasons stated above, the writ should be granted and the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta Int'l Airport
Atlanta, Georgia 30320

JAMES W. CALLISON
SIDNEY F. DAVIS
ROBERT S. HARKEY
Attorneys for Petitioner

Of Counsel:

ROBERT REED GRAY, Esq.
HALE RUSSELL GRAY SEAMAN
& BIRKETT
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Appendices

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1901

DELTA AIR LINES, INC.,
Petitioner

v.

CIVIL AERONAUTICS BOARD,
Respondent

COMMITTEE OF FORMER NORTHEAST STEWARDESSES,
Intervenor

Petition for Review of an Order of the
Civil Aeronautics Board

Argued October 4, 1977

Decided January 20, 1978

Frank F. Rox and *Robert S. Harkey* with whom *Robert Reed Gray* was on the brief, for petitioner.

Barbara Thorson, Attorney, Civil Aeronautics Board with whom *James C. Shultz*, General Counsel, *Jerome Nelson*, Deputy General Counsel, *Glen M. Bendixsen*, Associate General Counsel, Civil Aeronautics Board and *Carl D. Lawson* and *Daniel J. Conway*, Attorneys, Department of Justice were on the brief, for respondent.

J. Gordon Forester, Jr., for intervenor.

Before: BAZELON, *Chief Judge*, TAMM and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* In June 1974, a Committee of Former Northeast Stewardesses (Committee) petitioned the Civil Aeronautics Board (Board) to direct Delta Air Lines, Inc., to submit to arbitration the integration of stewardess seniority lists following the merger of Northeast Airlines, Inc., into Delta. This appeal arises from the order of the Board granting the Committee's petition.[1] The basic question before this court is whether the Board abused its discretion by referring to the arbitrator the procedural issue of timeliness of the request for arbitration, rather than deciding that issue on the record before it. For the reasons stated below, we affirm the Board's order.

I

In the spring of 1972, the Board approved the merger of Delta and Northeast, subject to certain labor protective provisions (LPP's).[2] Section 3 of those provisions states:

> Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.[3]

[1] CAB Order 76-9-129 (Sept. 23, 1976), Joint Appendix (J.A.) at 17. This appeal was filed pursuant to 49 U.S.C. § 1486(a) (1970).

[2] CAB Orders 72-5-73/74 (April 24, 1972), J.A. at 76, 79.

[3] *Id.*, Appendix I at 1, J.A. at 65.

Section 13(a) provides that any party may refer a dispute arising under the LPP's to an arbitrator, and that "a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties."[4]

Prior to the merger, which became effective on August 1, 1972, the Transport Workers Union of America, AFL-CIO (TWU), had been the collective bargaining representative for the Northeast stewardesses. Between midsummer and early October of 1972, representatives of Delta and Delta stewardesses had a series of meetings with a group of former Northeast stewardesses to negotiate the integration of seniority lists, but no agreement was reached. During the month of October, Delta unilaterally integrated the seniority lists and informed all stewardesses of the results of that integration by letter dated October 31, 1972.[5]

In the meantime, after the impasse had developed in negotiations, the negotiating group of former Northeast stewardesses asked TWU to pursue their arbitration remedy. On September 29, 1972, TWU informed Delta that it intended "to seek the appropriate relief,"[6] and on October 4, 1972, requested the National Mediation Board to furnish a panel of arbitrators for the integration dispute.[7] Delta, however, refused to participate in the selection of an arbitrator, on the ground that TWU had not provided any evidence that it continued to represent any former Northeast stewardesses after the effective date of the merger.[8]

[4] *Id.*, Appendix I at 9, J.A. at 73.

[5] J.A. at 137.

[6] *Id.* at 83.

[7] *Id.* at 95, 100.

[8] *Id.* at 106.

On January 30, 1973, TWU, on behalf of the stewardesses formerly employed by Northeast, petitioned the Board to direct arbitration of seniority list integration. Delta opposed the petition, still basing its opposition to arbitration on TWU's failure to demonstrate its representational capacity. In an order dated September 11, 1973, the Board dismissed TWU's petition. The Board held that TWU was not the representative of the former Northeast employees under the LPP's merely because it was their collective bargaining representative prior to the merger.[9] Furthermore, since Delta conceded its duty to arbitrate the seniority dispute upon demand of dissatisfied stewardesses or their authorized representative, the Board found that its immediate intervention was unnecessary.[10] In a footnote, the Board specifically addressed Delta's contention that no timely complaint against the integrated seniority list had been filed under the LPP's, stating that such issues "are appropriate matters for resolution in the context of negotiation or an arbitration proceeding. . . ." [11]

Because TWU did not appeal the Board's order or attempt to present evidence to Delta of its representational authority, the Committee, which has intervened on this appeal, was formed to pursue arbitration. To that end, the Committee hired an attorney and sought representational authorization from other dissatisfied stewardesses.[12] In a series of letters to Delta from March through May of 1974, the Committee requested that the seniority list integration dispute be submitted to arbitration, contending, in part, that the present request was "a continuum of those made of Delta as far back as October, 1972." [13]

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[9] CAB Order 73-9-42 at 5 (Sept. 11, 1973), J.A. at 9.

[10] *Id.* at 4, J.A. at 8.

[11] *Id.* at 4 n.5, J.A. at 8 n.5.

[12] J.A. at 207.

[13] *Id.* at 187; *see id.* at 183, 189.

Delta renewed its assertion that the complaint was untimely,[14] and the Committee petitioned the Board to compel arbitration.

After an initial dismissal of the petition,[15] an appeal from that order, and a remand by this court for a decision on the merits,[16] the Board granted the Committee's petition and ordered arbitration. In its mandate to the arbitrator, the Board included the initial "jurisdictional" question of "whether, under all of the circumstances, the claim to arbitration was asserted within a reasonable time." [17] In justifying the delegation of the timeliness issue to the arbitrator, the Board stated that, on the basis of the inadequate record before it, it was unable definitively to resolve certain issues which were possibly pertinent to the merits of Delta's timeliness argument, such as the representational aspects of the dispute, the possibility that Delta contributed to delay, and the effect of Delta's actual knowledge of employee dissatisfaction.[18] Such issues, the Board stated, are the type "in which an experienced labor arbitrator may well be able to shed more light, more quickly than the Board." [19] We are now called upon to review the Board's decision to refer the timeliness issue to arbitration.

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[14] *Id.* at 187.

[15] CAB Order 75-1-6 (Jan. 2, 1975), J.A. at 12. In this order, the Board stated that the courts, rather than the Board, were the proper forums for seeking enforcement of arbitration clauses in LPP's. It also made specific reference to the footnote in its earlier order in which it had posited that the issue of timeliness should be dealt with in arbitration. *Id.* at 2-3, J.A. at 13 n.3, 14.

[16] Committee of Former Northeast Stewardesses v. CAB, No. 75-1066 (D.C. Cir. May 27, 1975).

[17] CAB Order 76-9-129 at 5 (Sept. 23, 1976), J.A. at 21.

[18] *Id.* at 4-5, J.A. at 20-21.

[19] *Id.* at 5, J.A. at 21.

II

In our review, we must initially determine whether the Board has the discretion to delegate procedural issues arising under the LPP's, such as timeliness of arbitration complaints, to an arbitrator. If the Board does have such discretion and acted within its scope, we must then decide, on the basis of the administrative record, whether the Board abused its discretion. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-16 (1971);[20] *see* 5 U.S.C. § 706(2)(A) (1970).

It is clear that the Board has the authority to impose conditions on its approval of the merger of air carriers, *Kent* v. *CAB*, 204 F.2d 263, 265 (2d Cir.), *cert. denied*, 346 U.S. 826 (1953); *see* 49 U.S.C. § 1378 (b) (1970), and that these conditions may include the duty to negotiate and arbitrate disputes over the integration of seniority lists of employees affected by the merger. *Outland* v. *CAB*, 284 F.2d 224, 229 (D.C. Cir. 1960). In *American Airlines, Inc.* v. *CAB*, 445 F.2d 891, 895 (2d Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972), the court sanctioned the arbitration of such substantive disputes under LPP's, stating, in part:

> The Board, like other agencies, operates on a limited budget, both of money and of time; it may properly decide that these scarce resources should be husbanded for the tasks for which it considers itself to be expert, rather than frittered away in an area more suitable for an experienced labor arbitrator.

When called upon to interpret negotiated labor contracts, courts have repeatedly held that procedural issues,

[20] In *Citizens to Preserve Overton Park*, the Supreme Court also suggested a third inquiry for review of an agency's informal adjudication—whether the agency "followed the necessary procedural requirements." 401 U.S. at 417. However, in this case there is no contention that the Board's procedures were inadequate or erroneous.

such as whether grievances were properly and timely filed, should be delegated to arbitration along with the substantive issues of labor disputes. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 557 (1964); *accord*, *Tobacco Workers International Union, Local 317* v. *Lorillard Corp.*, 448 F.2d 949, 953-54 (4th Cir. 1971); *Rochester Telephone Corp.* v. *Communication Workers of America*, 340 F.2d 237, 238-39 (2d Cir. 1965). One rationale for approval of the delegation of procedural issues to arbitration is that the substantive and procedural aspects of labor controversies are normally so intertwined that dividing their resolution between arbitrators and courts would cause unnecessary delay and duplication of effort. *John Wiley & Sons* v. *Livingston*, 376 U.S. at 557-58. Furthermore, questions as to whether the procedural prerequisites to arbitration have been met "do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it." *Id.* at 556-57. Therefore, the knowledge and expertise of an experienced labor arbitrator may be just as necessary to the efficacious disposition of the procedural problems of an arbitrable dispute as to the resolution of the substance of the labor controversy itself. *Association of Industrial Scientists* v. *Shell Development Co.*, 348 F.2d 385, 389 (9th Cir. 1965); *see Carey* v. *General Electric Co.*, 315 F.2d 499, 503 (2d Cir. 1963), *cert. denied*, 377 U.S. 908 (1964).

The reasoning of these labor contract decisions is equally applicable to procedural disputes arising under LPP's imposed by the Board during mergers. Just as under negotiated labor contracts, both the procedural and substantive issues under the LPP's normally involve labor relations law and custom, subjects in which the Board has neither experience nor specialized knowledge. *See Outland* v. *CAB*, 284 F.2d at 228. Once it is determined, therefore, that the subject matter of a controversy is

subject to arbitration under the LPP's, we believe that the Board has the discretion to refer to the arbitrator questions concerning the procedural propriety of the claims for arbitration of that controversy.

In this case, it is clear that the dispute over the integration of the seniority lists was arbitrable. CAB Orders 72-5-73/74 (April 24, 1972); *see American Airlines, Inc.* v. *CAB*, 445 F.2d at 228. Delta's refusal to participate in arbitration was based on the procedural contention that no proper request for arbitration of the dispute had been filed with it within the time limits established by section 13 of the LPP's. Under these circumstances, it can reasonably be said that the Board, after finding the substance of the dispute arbitrable, acted within the scope of its discretion in delegating the procedural question to the arbitrator.

The next step in our review is to determine whether the Board, although acting within the scope of its discretion, abused that discretion in this case by referring Delta's timeliness contention to arbitration. To make this determination, we must carefully examine the administrative record, *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973), to ascertain, first, whether the Board considered the relevant factors, and second, whether it made "a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 416.

From an inspection of the Board's order and the material before it when its decision was made, it is plain that the Board considered those factors relevant to its choice to refer the procedural issue to the arbitrator. It took specific note of the policy underlying the arbitration clause in the LPP's—to promote the expeditious settlement of labor disputes arising after mergers—and stated that its normal inclination would be to resolve the timeliness issue itself, rather than referring it to arbi-

tration.[21] However, after inspecting the record, the Board believed that, although there were certain undisputed facts which might appear dispositive of the procedural argument, there were also factual inadequacies on various issues which the Board perceived as possibly pertinent to the final outcome of the dispute.[22] Moreover, the resolution of those labor issues would involve not only further factual investigation, but also the application of labor law principles in which the Board had no special knowledge or expertise.[23] Our study of the Board's order in this case thus reveals that the Board carefully considered those factors relevant to its final decision, balancing the general desire for speedy settlement under the LPP's against the need in this particular case for further factual and legal determinations by an experienced labor arbitrator.

The question remains, however, whether the Board made a clear error of judgment in declining to decide the timeliness issue on the record before it. In this regard, Delta asserts that all the facts necessary to a decision on the timeliness issue were undisputed and therefore that the Board's reasons for delegating the procedural question were not supported by the record.[24] We do not agree.

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[21] CAB Order 76-9-129 at 4, 6 (Sept. 23, 1976), J.A. at 20, 22.

[22] *Id.* at 5, J.A. at 21.

[23] *Id.*

[24] Brief of Petitioner at 16-17, 29. Delta also contends that the Board's treatment of the record was inconsistent with its announced preference for resolving procedural issues itself in order to expedite the settlement of disputes under LPP's. *Id.* at 29-33; *see* CAB Order 76-9-129 at 4, 6 (Sept. 23, 1976), J.A. at 20, 22. We do not believe, however, that the Board, by stating its "normal inclination" to decide such issues, was thereby setting a standard for itself from which it could not deviate without being found to have engaged in arbitrary and capricious action. *Cf.* City of Lawrence v. CAB, 343 F.2d 583, 588 (1st Cir. 1965) (in which the court cited and relied on cases in which the agency was held to have established such a standard). Rather, we believe that the Board was recognizing that it had the discretion either to resolve or to delegate

The undisputed facts in the record before the Board do reveal that the Committee made no formal protest to Delta until many months after the Board's September 1973 decision on TWU's representational capacity.[25] However, depending upon the arbitrator's resolution of the issues posed by the Board, such a lapse of time could become irrelevant to the final outcome of the timeliness dispute. For instance, the arbitrator might find that Delta contributed to delay in arbitration requests or had actual knowledge of stewardess dissatisfaction, and that such delay or knowledge caused Delta's duty to arbitrate to arise within the LPP's time limit. Moreover, if the arbitrator found that TWU or some other group or individual actually represented the former Northeast stewardesses and made a timely demand for arbitration, such factual and legal findings could eliminate any procedural deficiencies in the Committee's subsequent requests.[26] Because of its uncertainty as to the facts relating to these issues and their legal effect on Delta's timeliness contention, the Board decided to refer the whole matter to the arbitrator, rather than to make a decision based on a record which it believed to be inadequate and grounded on labor principles with which it was unfamiliar.

The outcome of this case might have been different if there had been no factual basis in the record for the

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the timeliness question, depending upon the adequacy of the record before it and the perceived need for specialized knowledge in labor matters to deal with the question. Furthermore, throughout the prolonged proceedings leading to this appeal, the Board had consistently stated that Delta's particular timeliness argument should be resolved in negotiation and arbitration.

[25] *See* notes 12 & 13 *supra*.

[26] In this regard, although Delta has asserted throughout these proceedings that no proper request for arbitration was filed with it until 1974, *see* J.A. at 187, the Committee alleges that its request is merely a continuation of those lodged in the fall of 1972 by TWU, *see id.* at 183, 187.

issues raised by the Board or if the legal aspects of those issues had previously been settled. However, all the issues which the Board believed might ultimately be pertinent to the proper resolution of Delta's timeliness contention did have a factual basis in the record already before the Board and were unresolved at the time of its order. For instance, the question of whether TWU or other groups or individuals actually had the authority to represent former Northeast stewardesses was not answered clearly by the documents or assertions in the record and had not been resolved completely by the Board's earlier order.[27] Furthermore, the record indicates that Delta could have had actual knowledge of employee dissatisfaction in the fall of 1972 and that its continuing insistence on formal representational authorization could have contributed to the delay in arbitration requests.[28]

The administrative record in this case thus supports the factual existence of those issues which the Board believed might be important to the final disposition of the timeliness issue. Finding that further investigation and experienced application of labor law principles were necessary to the proper resolution of these issues, both as to

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[27] *See id.* at 146-48, 169; CAB Order 73-9-42 (Sept. 11, 1973), J.A. at 5. In its order dismissing TWU's petition, the Board confined its discussion of TWU's authority to represent the former Northeast stewardesses to the issue of whether TWU's representational status transcended the merger.

[28] For instance, Delta was informed of TWU's intention to pursue arbitration on behalf of the former Northeast stewardesses in September 1972, J.A. at 83, and of TWU's requests to the National Mediation Board in October 1972, *id.* at 100. Actual knowledge of specific employee discontent can also be attributed to Delta at the time TWU filed its supplemental petition to the Board, with letters from five stewardesses to TWU voicing their dissatisfaction with the integrated seniority list. *See id.* at 141, 146-54. Furthermore, whether or not such action was legally justified, it cannot be denied that Delta's demands for formal representational authorization delayed both TWU's and the Committee's pursuit of the arbitration remedy. *See id.* at 107-08, 183, 187.

their factual basis and their legal effect, the Board referred the entire procedural problem to the arbitrator. On the basis of the record before us, we do not believe that such delegation constitutes a clear error of judgment.

III

Many of the problems posed by the present case are of the Board's own making. A concise statement of the approved manner of filing requests for arbitration and of establishing representational capacity would eliminate confusion and delay in the settling of disputes under the LPP's. Nevertheless, we find that the Board had the discretion to delegate to arbitration the resolution of the timeliness issue raised by Delta. We further hold, after reviewing the administrative record, that the Board did not abuse its discretion in doing so. The order of the Board is therefore

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1974

No. 75-1066

COMMITTEE OF FORMER NORTHEAST STEWARDESSES,
Petitioner

v.

CIVIL AERONAUTICS BOARD,
Respondent.

DELTA AIR LINES, INC.,
Intervenor.

Before MCGOWAN AND TAMM, *Circuit Judges*

ORDER

On consideration of the petitioner's motion for summary reversal and of the responses thereto, and of the respondent's motion for summary affirmance and of the responses thereto, and it appearing to the Court that the issue presented by the petition for review herein has been decided by the Court in *Carey* v. *J. J. O'Donnell*, —— U.S. App. D.C. ——, 506 F.2d 107 (1974), *cert. denied*, 42 L. Ed. 2d 6 (1975), it is

ORDERED by the Court that order No. 75-1-6 of the Civil Aeronautics Board is hereby reversed, and the case remanded to the Board for a decision on the merits of petitioner's claims; and it is

FURTHER ORDERED that the respondent's motion for summary affirmance is denied. *See also Northeast Master Executive Council* v. *Civil Aeronautics Board*, —— U.S. App. D.C. ——, 506 F.2d 97 (1974), *cert. denied*, 95 S. Ct. 783 (1975); *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973); *Oling* v. *Air Line Pilots Association*, 346 F.2d 270 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

Per Curiam

APPENDIX C

ORDER 76-9-129

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 23rd day of September, 1976

Docket 23315

DELTA-NORTHEAST MERGER CASE

ORDER ON REMAND

The Committee of Former Northeast Stewardesses has petitioned the Board to issue an order directing Delta Air Lines, Inc., to submit to arbitration a claim that the integrated flight attendant seniority list adopted by Delta following merger with Northeast Airlines, Inc., is unfair as to former Northeast attendants.[1] By Order 75-1-6 (January 2, 1975) the Board dismissed the petition, essentially on grounds that it would be inappropriate and inefficient for the Board to interpose itself as a forum

[1] The merger was approved by Orders 72-5-73/74 (served May 19, 1972), subject to the Board's standard labor protective provisions. Section 3 of the provisions provides for "the integration of seniority lists in a fair and equitable manner," and Section 13 provides for arbitration of disputes arising under the provisions. The Board retained jurisdiction over the merger proceeding generally. It is pursuant to the labor protective provisions and the Board's retained jurisdiction that the petition is filed.

in what it saw to be a contractual dispute, which ordinarily would be resolved in judicial proceedings.[2]

Petitioner sought court review and by an order dated May 27, 1975, the United States Court of Appeals for the District of Columbia Circuit, on motion for summary reversal, reversed and remanded the Board's order, "for a decision on the merits of petitioner's claims."[3] Following an unsuccessful attempt to persuade the court to reconsider or clarify its order, the Board, on August 18, 1975, invited the parties to submit comments on the scope of the Board's inquiry in response to the remand. There followed two rounds of comments by Delta and the employee group, the last filed November 24, 1975.[4] This order is to comply with the court's order remanding the case to the Board.

The Court of Appeals' brief order does not address the concerns which prompted us to decline to entertain the petition initially. We continue to believe that Board-ordered, as compared to court-ordered, arbitration of specific labor-management disputes is not ordinarily a satisfactory or a speedy means of resolving such disputes.[5] This remains our view notwithstanding that the Court has apparently ruled against the necessary predicate for the Board's position, namely, that although jurisdiction with respect to the arbitration section of the labor protective provisions is shared by the Board and the courts, the Board has discretion to refer the parties to a judicial tribunal for its enforcement.[6] Given that ruling, however, it is evident that we must put aside our reservations about the efficacy of the relief requested of us and consider the request on its own merits. Upon such consideration, the Board has concluded that the petition should be granted as being in the public interest.

As a threshold matter, we must determine the scope of the Board's inquiry in reaching "a decision on the

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[2] Moreover, we found affirmative reasons for staying our hand, particularly, we noted that the Board, unlike the courts, has no particular expertise as a tribunal in labor-management matters, and that resort to the Board instead of the courts would be likely to spawn additional litigation and consequent delay since, for one, the Board has no direct contempt power to enforce an order directing arbitration.

[3] *Committee of Former Northeast Stewardesses* v. *C.A.B.*, D.C. Cir., No. 75-1066.

[4] The second (unauthorized) round consists of a response by petitioner to Delta's comments in the form of a petition for leave to file an extraordinary document, and a subsequent motion by Delta requesting rejection of that document. We will deny the "petition" for lack of good cause being shown and untimeliness. Delta's motion, being moot, will be dismissed.

[5] See also our discussion of this point in the *Allegheny-Mohawk Merger Case*, Orders 72-4-31/32 (decided March 28, 1972), Opinion at 20-21. Indeed, the Board's redraft of the standard arbitration section in the *Allegheny-Mohawk* case, to the form applied here, was specifically designed to obviate the need for resort to the Board under its retained jurisdiction prior to any court enforcement of the arbitration provisions.

[6] The court's ruling is predicated upon the case of *Carey* v. *J. J. O'Donnell*, 506 F.2d 107 (1974), *cert. denied*, 95 S. Ct. 783 (1975). *Carey* concerned a Board order determining that a negotiated seniority list—arising out of the instant merger, and involving the Northeast pilots—had been integrated in a fair and equitable manner. That order was sustained on direct review by the Court of Appeals in a companion case, *Northeast Master Executive Council* v. *C.A.B.*, 506 F.2d 97 (1974), *cert. denied*, 95 S. Ct. 783 (1975). In *Carey* a District Court's dismissal of a suit attacking the integrated seniority list, for want of jurisdiction, was under review. The Court of Appeals held that the petitioners in that case, having "had their day in court as contemplated by the statute" (*viz.*, the Board's determination with respect to the seniority list and direct Court of Appeals review of that determination) were not entitled to collaterally attack the Board's action in District Court, or any other forum. In other words, the Board having acted upon the merits of a claim that an integrated list is unfair, the only remaining remedy is review of the Board's action in a Court of Appeals pursuant to Section 1006 of the Federal Aviation Act, and district courts have no jurisdiction with respect to the subject matter.

merits of petitioner's claim," as mandated by the court. It may be argued that the court, in relying on *Carey*, contemplated that the Board will here, as in that case, make a determination as to whether or not the existing seniority list has been integrated in a fair and equitable manner. Such action is indisputably within our power. Delta in essence takes this position, in arguing that a showing must be made by petitioner that the existing list is unfair or inequitable before relief may be granted. Petitioner, on the other hand, asserts that this question is one for the arbitrator.

We do not read the court's order as requiring the Board itself to plumb the substance of petitioner's claim, beyond satisfying ourselves that the claim is not frivolous, see American-TCA Merger Case, Order 71-5-30 (May 7, 1971). It is the function of the arbitrator, as provided for by Section 13, to weigh the validity of petitioner's allegations of unfairness in light of all circumstances. Indeed, acceptance of Delta's argument would disembowel the labor protection provisions by rendering nugatory the arbitration clause. It would further place the substantive resolution of specific disputes and controversies, such as the integration of labor lists, with the Board, which has neither expertise nor resources to finally arbitrate such disputes. See *American Airlines* v. *C.A.B.*, 445 F.2d 891 (C.A. 2, 1971), *cert. denied*, 404 U.S. 1015 (1972), wherein the Second Circuit specifically upheld the Board's power to delegate this function to the arbitration process, in the absence of successful negotiation.[7]

[7] In *American*, the court sustained Board orders directing the carrier to arbitrate a seniority integration dispute arising out of the *American-Trans Caribbean Merger Case*. See Orders 71-5-30 (May 7, 1971) and 71-6-71 (June 11, 1971). It held that "[w]hat the Board can do, an arbitrator appointed pursuant to its order can likewise do." (445 F.2d at 896). Contentions were made to the Board in that case that the Board itself should resolve the fairness of the integrated seniority list, a course which the Board as a matter of discretion declined to take. The court approved

We find no compelling reason in the circumstances of this case warranting a departure from the Board's long-held and court-approved position that the resolution of specific disputes is best left for arbitration, and decline Delta's invitation to do so.[8]

As we noted in our original order in this matter, Delta concedes that it has received formal complaints regarding the equity of the seniority list integration, and requests for arbitration.[9] Indeed, there is no dispute that, pursuant to the labor protective provisions, Delta is under an obligation to arbitrate upon a valid request therefor. Delta's reason for failing to honor the requests it has received, aside from the above-discussed allegation that there has been no showing that the existing list was not developed fairly and equitably, is simply that the requests were untimely. It states that no formal complaint and request for arbitration was received by Delta until April 5, 1974, or some twenty months after the merger became effective. A delay in submission of this length is, in Delta's view, incompatible with the arbitration provision, which permits any party to refer any dispute or controversy arising under the labor protective provisions to arbitration "20 days after the controversy arises," and directs an arbitrator's decision "within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties."

the Board's action in the following terms: "If the Board's experience convinced it that the integration of seniority lists of employees of merging carriers was a function which it was not well suited to perform and which, in the absence of agreement, had best be left to arbitration, that was a judgment it was competent to make" (*Id.*, at 895).

[8] See *Outland* v. *C.A.B.*, 284 F.2d 224 (D.C. Cir., 1960); *O'Donnell* v. *Pan American World Airways*, 200 F.2d 929 (2nd Cir., 1953); and *American Airlines* v. *C.A.B.*, *supra*.

[9] Order 75-1-6 at 3.

Ordinarily, the Board would consider the above recital of facts, if true, to be dispositive of the question of timeliness. As we pointed out in the *Allegheny-Mohawk Merger Case*, *supra*, delays in reaching arbitration prolong labor disputes and undermine harmonious labor relations. Open-ended availability of arbitration can only ferment further strife and is an invitation for abuse of the system adopted by the Board for the protection of employees affected by a merger, or a large-sale acquisition. Moreover, it is clear that the Board's arbitration provision contemplates a speedy resolution of disputes.

On the other hand, we cannot ignore the highly unusual circumstances and conflicting assertions attending the history of this particular seniority list integration dispute. This history is described in some detail in Order 73-9-42 (served September 13, 1973) and Order 75-1-6, *supra*, the pertinent portions of which we incorporate herein by reference, and need not be repeated here at length. Briefly, the dispute was under active negotiation between the former Northeast stewardesses, more precisely, their assumed representative, the Transport Workers Union, since prior to the consummation of the merger; the negotiations failed; pursuit of arbitration by the Transport Workers Union, on behalf of the stewardesses, foundered because of problems with respect to the TWU's authority to represent the Northeast stewardesses (see Order 73-9-42, *supra*); and subsequent to TWU's withdrawal, a group of individual stewardesses took up the task of pursuing the arbitration remedy, culminating in the instant proceeding.

Moreover, while the record is rife with documents detailing various aspects of this continuing history, the material is in the form of numerous—and apparently conflicting—unsworn allegations of a factual, legal, and equitable nature, involving various aspects of labor-

management relations as well as other matters. Relevant to the ultimate issue of timeliness raised by Delta appears to be the question of the representational capacity of various individuals and groups, and the TWU, involved in the negotiations and the quest for arbitration of the underlying seniority integration dispute. Also pertinent may be Delta's actual knowledge of dissatisfaction with the seniority list adopted by it following the failure of negotiations and the form that such dissatisfaction took, whether formal complaints or otherwise. Furthermore, there is in our mind some question as to the extent that Delta's own actions in this ongoing controversy may have served to defeat, through delay, legitimate rights to arbitration under the Board's labor protective provisions.

On the record before us, we are unable to definitively resolve these and other questions pertinent to the merits of Delta's argument that the arbitration provisions are untimely invoked. In some part, the record is short on reliable facts. Moreover, elements of labor law, practice, and custom appear to also be relevant to untangling the various contentions, particularly the representational aspects. The Board believes it is imprudent to devote its limited and already overburdened resources to the resolution of the involved questions presented, particularly in light of the substantive labor related factual issues involved.[10]

In light of the above, we believe that the wisest course to follow in furtherance of the Court of Appeals' ruling

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[10] As we have often noted, the Board's premier function is the economic regulation of the nation's air transportation system in the public interest. To the extent that questions of labor relations affect that system, we may and do take cognizance of them, as for example by the promulgation of the labor protective provisions. However, we do not view ourselves as a labor tribunal for the resolution of specific disputes, for which other forums are generally available. Any other course would likely be at the expense, in time and effectiveness, of our other functions.

will be to order arbitration, but to include in the arbitrator's mandate a jurisdictional question. Specifically, the arbitrator is to determine, as an initial matter, his own jurisdiction to hear the merits of the claim with respect to the fairness of the integrated seniority list by first deciding whether, under all of the circumstances, the claim to arbitration was asserted within a reasonable time. If he finds not, his mandate ends. If he finds in the affirmative, he is then to consider the substantive matter of seniority integration. This is the type of inquiry in which an experienced labor arbitrator may well be able to shed more light, more quickly than the Board.[11] This delegation to the arbitrator represents, we believe, the most effective overall allocation of the resources of the Board as well as the parties, and is well within our competence to make, see *American Airlines* v. *C.A.B.*, *supra*. The arbitrator and the parties may employ such procedures for the resolution of these matters as they deem appropriate.

We should emphasize that our action with respect to the timeliness issue is predicated upon the particular circumstances present and the record before us. Our normal inclination, given an adequate record not requiring further proceedings, would be to resolve the issue at this stage. However, this is not, to all appearances, such a case.

Finally, we shall provide that the interests of all flight attendants shall be taken into account to the maximum extent feasible, even if not participating in the ordered

[11] We noted in our previous order denying TWU's petition and again in the initial order dismissing petitioner's request, that the question of whether a complaint against the integrated seniority list was filed within a reasonable time, as well as other issues, "are appropriate matters for resolution in the context of negotiations or an arbitration proceeding. . . ." Order 73-9-42 at 4, footnote 5; 75-1-6 at 2, footnote 3. We continue to adhere to this view.

arbitration proceeding. Concomitantly, we expect this arbitration to put an end to all claims by Delta's flight attendants with respect to the integration of seniority lists arising out of the merger, and will therefore provide that the arbitration shall be binding upon Delta and all flight attendants as to whom a dispute exists, whether choosing to participate or not.[12] In this connection, it will be incumbent upon Delta to provide appropriate notice to affected employees with respect to the arbitration proceeding. In addition, we note that should the merits of petitioner's claims with respect to seniority list integration be reached, the existing seniority list, which has been in effect for some time, may be disturbed. This may raise issues of retroactivity, which should be considered in the arbitrator's decision in light of all of the equities involved.

ACCORDINGLY, IT IS ORDERED THAT:

1. Ordering paragraph 1 of Order 75-1-6 (served January 6, 1975) be and it hereby is voided;

2. The petition of the Committee of Former Northeast Stewardesses, filed June 7, 1974, be and it hereby is granted to the extent ordered below;

3. Delta shall, within 60 days from the date of this order, participate in the selection of an arbitrator pursuant to the provisions of Section 13(a) of the labor protective provisions for the purposes enumerated in the text, above, the arbitration to be conducted in conformance with said Section 13(a): *Provided*, That nothing in this order shall preclude the parties from agreeing to proceed pursuant to Section 13(b) of the labor protective provisions within the above-named period;

[12] *American-TCA Merger Case*, Order 71-5-30 (May 7, 1971), and Order 71-6-71 (June 11, 1971).

4. In the event that any group of flight attendants of Delta or their representative(s) shall decline to participate in, or fail to cooperate with respect to the ordered arbitration proceedings, the procedures adopted shall be such as to ensure, to the maximum extent feasible under the circumstances, that the determination rendered by the arbitral tribunal shall fully consider the interests of such employees;

5. The determination of the arbitral tribunal shall be final and binding upon Delta and all flight attendants of Delta as to whom there exists a dispute with respect to seniority list integration which has been the subject of the arbitration proceedings ordered herein;

6. Delta shall provide appropriate notice to all affected employees or their representatives with respect to the institution of the arbitration proceedings, the issues to be decided, and the employees' right to participate therein;

7. Delta shall, upon the rendering of any arbitrator's decision, file 2 copies of such decision in the docket of this proceeding;

8. The Board shall retain jurisdiction in this proceeding for the purpose of taking such further action as it may deem necessary or appropriate in the public interests; and

9. Except to the extent granted herein, the petition of the Committee of Former Northeast Stewardesses and all petitions, motions and other requests related thereto be and they hereby are denied.

This order shall be published in the Federal Register.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

[SEAL]

APPENDIX D

Order 75-1-6

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 2nd day of January, 1975

Docket 23315

DELTA-NORTHEAST MERGER CASE

ORDER

By Order 72-5-73/74 the Board approved the merger of Delta Air Lines and Northeast Airlines subject to acceptance by Delta of *Allegheny-Mohawk*[1] type labor protective provisions. Delta unequivocally accepted that condition, among others: See Order 72-8-1.

Section 3 of the labor protective provisions reads as follows:

> "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute

[1] Orders 72-4-31/32.

may be submitted by either party for adjustment in accordance with section 13."

Section 13 of the provisions provides for the arbitration of any dispute or controversy that arises with respect to the labor protective provisions. The Board also, in accordance with its customary practice, reserved jurisdiction to make such modifications, amendments, and additions to the labor protective provisions as circumstances may require.

In reliance on this reserved jurisdiction, and on sections 3 and 13 of the labor protective provisions, various former Northeast flight attendants have petitioned the Board to order that Delta submit to arbitration for the purpose of resolving their dispute with Delta regarding the integration of the flight attendant seniority lists of Delta and Northeast.[2]

The petition here before us is the second one dealing with this subject matter. A similar petition was filed approximately one year earlier by the Transport Workers Union (on behalf of the Northeast flight attendants) seeking the same relief. Delta opposed grant of that petition on various grounds, including that the relief sought was untimely.

While the Board denied TWU's petition, the order made clear that Delta was obligated to proceed to arbitration if presented with evidence of authority by TWU to represent the flight attendants.[3] The Board concluded

[2] There has also been filed a motion on behalf of the petitioners for leave to file unauthorized documents. The motion will be granted.

[3] Order 73-9-42. The Board pointed out that: (1) Delta agreed that it was under a duty to arbitrate any unresolved seniority dispute with any dissatisfied former Northeast employee and that, in any case, such an obligation was clear; (2) the TWU could not be deemed a "representative" of the former Northeast flight attendants merely because that union had been their collective bargaining agent prior to the merger; (3) the TWU, in complaining to Delta about the manner in which the seniority lists were integrated, did not provide evidence to Delta that it in fact was representing any former Northeast flight attendants in making the complaint; and (4) the carrier had not received a formal complaint from any Northeast flight attendant with respect to seniority integration or from any representative who was able to give evidence of his representative capacity.

The Board went on to note, in respect to Delta's argument regarding the alleged untimeliness of TWU's complaint to Delta regarding seniority integration, that this argument and other similar ones "are appropriate matters for resolution in the context of negotiation or an arbitration proceeding and accordingly we do not decide them here."

that: "Thus, TWU may ultimately obtain arbitration if it presents evidence to Delta of authority to represent former Northeast employees and if that dispute is not otherwise resolved. In these circumstances, we fail to perceive any duty on our part to direct that which TWU may obtain through its own efforts." The same order also referred to the Board's view "that it should not intervene to order arbitration where arbitration can be directed by a court with authority to enforce its decree, and that the more appropriate enforcement action by the Board is penalty action against a carrier for violation of the requirement to arbitrate."[4]

According to the petition at hand, the manner in which the Northeast and Delta flight attendant seniority lists were integrated by Delta is unfair to the former Northeast flight attendants. The petition goes on to argue that the integrated list has never been agreed to by any authorized representative of all the former Northeast flight attendants; and that subsequent to the issuance of Order 73-9-42, *supra*, three former Northeast stewardesses, on behalf of many others, asked that Delta arbitrate the seniority list integration dispute and that Delta has refused.

[4] The Board used the same words in an even more recent order in a proceeding also arising out of the Delta-Northeast Merger; Order 74-5-71.

In its answer Delta concedes that it has received a formal complaint from at least three former Northeast flight attendants regarding seniority list integration but argues that nonetheless it need not honor that request for arbitration, and that for three different reasons the Board should support Delta's position. First, the petition represents a "calculated effort to promote labor strife and disrupt relations between former Northeast and former Delta employees." Second, the Delta and Northeast "flight attendant seniority lists have been integrated in a fair and equitable manner. Third, the request for arbitration is untimely.

We have concluded that the petition should be dismissed since it is our view that the Board ordinarily ought not entertain petitions requesting that it direct air carriers to proceed to arbitration under the Board's standard labor protective provisions.

When the Board imposes conditions upon its approval of a merger agreement, the parties may either accept the conditions or withdraw from the agreement. If the conditions are accepted, they become in effect a part of the overall arrangement which the Board has approved. As a general proposition, the Board does not attempt to enforce the undertakings of the carriers toward third-parties, and we perceive no reason in principle why the Board itself should undertake to enforce the labor protective provisions of a merger arrangement to any greater extent than the Board would attempt to enforce compliance with other provisions therein. Further, there are affirmative reasons why it should not undertake to do so. We have repeatedly noted, and the courts have consistently agreed,[5] that the Board has no particular

[5] *E.g.*, Outland v. CAB, 109 U.S. app. D.C. 90, 284 F.2d 224 (1960), Northeast Master Exec. Council v. CAB, D.C. Cir. No. 73-1595 *et al.* (August 19, 1974).

expertise in labor-management matters. Indeed, the courts are likely to have considerably more experience than the Board in unraveling the facts involved in employer-employee disputes, and the resolution of the question of whether arbitration should be directed under labor protective provisions agreed to by the carrier should present issues no different from those involved in normal contract disputes where provisions are made for arbitration. Further, a Board proceeding to determine whether arbitration should be directed is all too likely to spawn litigation in addition to that which would ensue from direct resort to a court for an order directing arbitration. Not only must the Board ascertain the facts involved, but even if it should order arbitration (and such an order might well be appealed to the courts),[6] the Board has no direct power to enforce the requirement. Thus, if the Board's order were not obeyed, the Board would be required to bring an action against the carrier in a district court to compel obedience or to embark upon some form of enforcement proceedings against the recalcitrant carrier, a course again calculated to increase rather than decrease litigation and resultant delay. Moreover the Board does not consider that it was established by the Congress to deal with individual disputes between carriers and their employees even though empowered to do so, but rather to deal with broad economic questions affecting the public. The Board discharges this duty in merger cases by providing in its labor protective provisions the machinery through which individual disputes can be resolved. The jurisdiction which it has retained to take further action concerning labor protective matters more appropriately is employed for determining whether there should be changes in the basic protective provisions in response to a demonstrated

[6] See American Airlines v. CAB, 445 F.2d 891 (C.A. 2, 1971), *cert. denied*, 404 U.S. 1015 (1972).

need therefor, rather than for enforcing the requirements of those provisions in individual cases. Judicial enforcement of the requirement to arbitrate represents no impingement upon the Board's authority to alter the basic provisions where the public interest requires their alteration. Conversely, a deferral by the board to the greater expertise and enforcement powers of the courts does not represent any abdication by the Board of its duties. Rather, the situation is the familiar one in which third-party rights are enforced by the courts.

In these circumstances the Board reiterates that employees such as those here involved should resort to the courts to the extent that they seek an order directing a carrier to proceed to arbitration. This is not to say, however, that a carrier may ignore the requirement for arbitration with impunity. On the contrary, in our view it does so at its peril. A willful or unjustifiable failure to proceed to arbitration represents a failure on the part of the carrier to comply with the Board's requirement that the labor protective conditions be carried out as a part of the obligations undertaken by the carrier in connection with its merger. The consequences, in our view, are that the carrier is subject to appropriate enforcement action.[7]

In this same regard, and in view of the history of matters here under consideration and, particularly, our admonitions in Order 73-9-42—admonitions which Delta appears to have determined to ignore—we are referring to the Board's Bureau of Enforcement the question of whether Delta's refusal to honor the flight attendants' request to arbitrate warrants the institution of civil or criminal proceedings under sections 901 and 902 of the Act, or other appropriate enforcement action.

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[7] While any such enforcement action may have the practical effect of forcing compliance, this indirect effect is not the same as directing the carrier to arbitrate, and the concepts and consequences involved in the different types of actions are different.

ACCORDINGLY, IT IS ORDERED THAT:

1. The petition of a Committee of former Northeast flight attendants, filed June 7, 1974, for exercise of reserved jurisdiction be and it hereby is dismissed; and

2. The motion on behalf of the petitioners to file an unauthorized document be and it hereby is granted.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

[SEAL]

APPENDIX E

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Order 73-9-42

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 11th day of September, 1973

Docket 23315

DELTA-NORTHWEST MERGER CASE

ORDER

By Orders 72-5-73/74, served May 19, 1972, the Board approved the merger of Delta Air Lines and Northeast Airlines, Inc., subject to *Allegheny-Mohawk* type labor protective provisions (see Orders 72-4-31/32), with certain modifications not here relevant. Section 3 of those provisions reads as follows:

> "Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13."

Section 13 of the provisions provides for the arbitration of any dispute or controversy that arises with respect to the labor protective conditions. The Board also, in accordance with its customary practice, reserved jurisdic-

tion "to make such amendments, modifications, and additions to the labor protective conditions . . . as the circumstances may require." In reliance on this reserved jurisdiction and on the terms of sections 3 and 13 of the labor protective conditions, the Transport Workers Union of America, AFL-CIO ("TWU") filed a petition requesting that the Board (1) order arbitration pursuant to section 13 of the labor protective provisions to determine the fair and equitable integration of clerical and stewardess seniority lists of the two carriers and (2) require Delta to provide interim protection to the employees pending resolution of the dispute by recognizing the seniority status of all former Northeast employees as it existed on November 30, 1972. An answer in opposition to the petition has been filed by Delta.[1]

This dispute arises from efforts to integrate seniority lists for the two classes of employees in question. A first meeting was held on July 11, 1972, prior to consummation of the merger on August 1, 1972, among representatives of the two carriers and the TWU. At that meeting it was decided that further discussions among those present would be held concerning the clericals and that a TWU Northeast stewardess committee would meet with a Delta stewardess committee. The stewardess negotiations ended in deadlock after approximately two months, and counsel for the TWU notified Delta of its intention to arbitrate the dispute. At about the same time the union requested the National Mediation Board ("NMB") to furnish a panel of names from which the parties might select an arbitrator. On October 31, Delta informed all of the stewardesses that because of the impasse it would be necessary for the carrier to integrate the seniority lists unilaterally. Meanwhile, the TWU had made several re-

[1] The TWU represented Northeast stewardess and clerical personnel prior to the merger. Delta's stewardess and clerical employees are not represented by a labor organization.

quests to Delta for a seniority list for the Delta clericals as a first step toward integrating lists for that class of employees. Having failed to receive such a list, the TWU notified the NMB on August 29, 1972, that it wished to refer the matter to an arbitrator. Delta opposed both this request and the TWU request made in connection with the stewardess negotiations. On November 2, the NMB submitted to the parties two panels of names. However Delta has refused to arbitrate, denying any obligation on its part to do so.

In support of its petition the TWU alleges that it has sought to reach a satisfactory agreement with Delta, pursuant to the Board's order, as to the seniority rights of the former Northeast clericals and stewardesses; that Delta has refused to engage in good faith negotiations, has refused to arbitrate the dispute, and intends to integrate the lists unilaterally by a method considered unfair and unreasonable by the TWU and the former Northeast employees; that the TWU as a "party" to the merger proceeding is entitled to refer these disputes to arbitration under section 13; that a claim by Delta that the TWU must prove its representative status is without precedent; that further it is impossible for the TWU to prove its representative status because the NMB, the only agency with authority to certify representation, would not determine a representative for the ex-Northeast employees since they now constitute only a portion of a "craft or class"; and that the TWU is the only proper representative of the employees in question.

In its answer, Delta asserts that, despite Delta's statements that it would meet with TWU representatives if the TWU showed any evidence that it in fact represents the former Northeast employees under the labor protective provisions, the TWU has made no such showing, and that neither the TWU's status as a party in the merger case nor its status as the former representative

of the former Northeast employees under the Railway Labor Act in any way gives it the right to invoke arbitration. The carrier further states that the stewardess lists have been integrated in a fair and equitable manner in accordance with section 3 of the labor protective provisions; that it has not received a formal complaint from a single former Northeast employee with respect to seniority integration; that it dealt with a group of Northeast stewardess representatives in negotiations and was then requested to arbitrate with the TWU which had not participated in the negotiations; and that Delta is ready to submit to arbitration if it is invoked by dissatisfied employees. With respect to the clerical employees, Delta additionally argues that integration of seniority lists is unnecessary and inappropriate since seniority is not the controlling factor in determining job opportunities for those employees; to the extent that Delta does use seniority, it is based on date of hire and reference is merely made to personnel records.[2] Therefore, to the extent of its use, seniority was automatically integrated upon consummation of the merger. Finally, since the TWU is not entitled to the primary relief sought, Delta contends that "interim" relief pending arbitration is inappropriate.[3]

On May 21, 1973, the TWU filed a Petition for Permission to File an Extraordinary Document which purports to refute various assertions made by Delta in its answer to the TWU's original petition, and reiterates the TWU's request that the Board issue an order re-

[2] Thus, Delta claims, compliance with TWU's request would have required that Delta construct a seniority list for that class of employees.

[3] Delta contends that interim relief would be inappropriate since the grant of such relief would impinge upon Delta's ability to conduct its operations, and since the TWU has made no showing of irreparable injury (citing American-TCA Merger Case, Order 71-5-30, May 7, 1971).

quiring Delta and the TWU to select an arbitrator to determine integration of the seniority lists of the Delta and Northeast clericals and stewardesses, and that the Board order interim relief. Appended to this pleading are letters from former Northeast stewardesses now employed by Delta that, the TWU alleges, show that the stewardesses are dissatisfied with the integrated seniority list and look to the TWU for help.

On July 2, 1973, Delta filed a Motion for Leave to File an Unauthorized Document with its answer to the TWU's May 21 filing.[4] In its answer, Delta states that it still has not had a request from any former Northeast stewardess or clerical employees for arbitration of a seniority problem; that the TWU has not informed Delta of any authorization to represent any former Northeast employees in seniority matters; that the Board should reject TWU's petition on the grounds that no dispute has been properly submitted to Delta for arbitration within a reasonable period of time after the dispute arose; that the TWU's answer did not refute any of Delta's arguments with respect to the agent/clerical group; and that the Board should not look with favor upon the TWU's attempts to use the labor protective provisions to perpetuate its representation of various former Northeast Airlines' employees.

We will dismiss the TWU petition on the alternate grounds that (1) no showing has been made which warrants intervention on the Board's part, and (2) TWU is not a "representative" of the former Northeast employees for purposes of invoking the provisions for arbitration contained in our labor protective provisions merely because it was the collective bargaining representative of those employees prior to the merger.

[4] We will grant both the TWU's supplemental petition and Delta's motion for leave to file an unauthorized document.

The Board has heretofore noted that it lacks expertise in labor matters, that it is not charged with responsibility to act as a labor board for the aviation industry, and that its limited resources are more appropriately directed to the resolution of those tasks directly assigned to it and with which it is familiar. See *American Airlines* v. *CAB*, 445 F.2d 891 (2nd Cir., 1971), *cert. denied*, 92 S. Ct. 681 (1972); and *Outland* v. *CAB*, 284 F.2d 224 (D.C. Cir., 1960). Indeed, the requirement for arbitration of disputes between employees and carriers concerning the application of our labor protective conditions is grounded upon these premises. See *American-Trans Caribbean Merger Case*, Order 71-5-30, p. 4; *American Airlines* v. *CAB*, *supra*. For the same reasons, the Board has stated that it should not intervene to order arbitration where arbitration can be directed by a court with authority to enforce its decree, and that the more appropriate enforcement action by the Board is penalty action against a carrier for violation of the requirement to arbitrate. See *American-Trans Caribbean Merger Case* (Petition of James Matthiesen), Order 72-10-98, pp. 5-6.

We recognize that the present dispute involves issues other than a failure by a carrier to comply with the terms of the Board's prior order. Nonetheless, the plain purport of our prior holdings has been that disputes capable of resolution through negotiation or arbitration without recourse to the Board should be settled in that manner. Here, Delta has conceded, at least initially, that it is under a duty to arbitrate any unresolved seniority issue upon demand of any dissatisfied former Northeast employee or group of employees, and in our view that obligation is clear. Moreover, TWU asserts that it has in fact been requested by former Northeast employees to act in their behalf. Thus, TWU may ultimately obtain arbitration if it presents evidence to Delta of authority to represent former Northeast employees and if the dispute is not

otherwise resolved. In these circumstances, we fail to perceive any duty on our part to direct that which TWU may obtain through its own efforts.[5]

Further, if it be thought that the Board should determine whether TWU is the present "representative" of the former Northeast employees within the meaning of this term as used in section 3 of the labor protective conditions solely on the basis of its status as their collective bargaining representative when they were employed by Northeast, our determination is that it is not.[6] We need not reach the question of whether, if an agreement between TWU and Delta had been negotiated or consummated prior to the merger, TWU would have had standing to complain of any breach (as opposed to being required to show that it was authorized to act by employee beneficiaries of the agreement). No such agreement was in fact reached, and it does not appear that TWU's status as collective bargaining representative of the Northeast employees for Railway Labor Act purposes survived the merger (see *Air Line Employees Association* v. *CAB*, 413 F.2d 1092 (CADC 1969)). Moreover, a continuation

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[5] In its answer to the TWU's supplemental petition, Delta raises the argument that the former Northeast employees should not be granted relief, in any event, since they have not filed a complaint against the integrated seniority list within a reasonable time. This question, as well as such questions as the impact to be given in a section 3 dispute to the fact that a relatively small number of employees are dissatisfied with the manner in which the seniority lists were integrated (if that is in fact the case), and the applicability of the seniority integration provisions of section 3 to Delta's clerical employees, are appropriate matters for resolution in the context of negotiation or an arbitration proceeding and, accordingly, we do not decide them here.

[6] TWU's argument that it has a right to invoke arbitration under section 13(a) by reason of its status as a party to the merger proceeding is not persuasive. Clearly, from the context of that section, its reference to "any party" was intended to encompass only parties to the particular dispute in question.

of representative status is not essential to the application and enforcement of the labor protective conditions.

In these circumstances, no persuasive reason has been advanced as to why TWU should be deemed to represent the former Northeast employees merely because it was their former representative. Such automatic status is not required either for the purpose of enabling employees to avail themselves of the Board's labor protective provisions or to enable the former bargaining representative to represent the employees if the employees so desire. On the other hand, significant changes in employer-employee relations resulting from a merger can result in different interests between a union and its former members so that the employees would not necessarily want the union to represent them for labor protective purposes. Moreover, the Board has recognized that every group of employees affected by negotiations under these provisions is entitled to separate representation that will protect the group's interest (see Order 71-5-30, *supra*, at page 5, note 10; *Braniff-Mid-Continent Merger Case*, 17 CAB 19 (1953)). It can be argued, of course, that recognition of the union as a continuing "representative" for purposes of section 3 will not defeat any right of employees not desiring such representation since they may be represented by someone else. However, there is no showing that this course of action will promote stability in labor relations. Indeed, such stability might be better advanced if the shoe is on the other foot.

ACCORDINGLY, IT IS ORDERED:

1. That the petition of the Transport Workers Union of America, AFL-CIO, for exercise of reserved jurisdiction, be and it hereby is dismissed;

2. That the petition of the Transport Workers Union for leave to file an extraordinary document be and it hereby is granted; and

3. That the motion of Delta Air Lines, Inc. for leave to file an unauthorized document be and it hereby is granted.

By the Civil Aeronautics Board;

EDWIN Z. HOLLAND
Secretary

[SEAL]

MURPHY, Member, Filed The Attached Dissent.

MURPHY, Member, Dissenting:

The petition and related pleadings herein raise a close question. I am persuaded, however, that the TWU has effectively demonstrated that it represents certain Delta stewardesses formerly employed by Northeast Airlines for purposes of requesting arbitration. Letters attached to the petition filed by TWU on May 21, 1973 show that several former Northeast stewardesses are dissatisfied with the manner with which the seniority rosters were integrated and look to the TWU for assistance. It is true the letters do not in formal terms designate TWU as representative of these stewardesses but that is the fair purport of the letters. To hold otherwise, in my view, elevates form over substance. Aggrieved employees, no matter how small their number, may select whomever they choose as their designee to secure their rights under the labor protective conditions. These stewardesses have selected TWU and I believe that selection should be honored.

The Board could, as the majority suggests, leave TWU and the stewardesses to seek a court order directing arbitration. However, we also have the power under our reserved jurisdiction to order arbitration. To issue such

an order would be a simple matter for the Board and would not involve us in labor matters beyond our competence. I believe stability of labor relations would be fostered by this action. If the complaints of these few stewardesses are groundless, the arbitrator will so find and Delta will not be injured. In fairness, therefore, the Board, as a matter of discretion, should grant TWU's petition.

/s/ ROBERT T. MURPHY

APPENDIX F

Federal Aviation Act of 1958

§ 408 (49 U.S.C. § 1378)

§ 1378. Consolidation, merger, and acquisition of control—Prohibited acts

(a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Application to Board; hearing; approval; disposal without hearing.

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe; *Provided*, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further*, That if the applicant is a carrier other than an air carrier, or a person con-

trolled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further*, That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

Interests in ground facilities

(c) The provisions of this section and section 1379 of this title shall not apply with respect to the acquisition or holding by any air carrier, or any officer or director thereof, of (1) any interest in any ticket office, landing area, hangar, or other ground facility reasonably incidental to the performance by such air carrier of any of its services, or (2) any stock or other interest or any office or directorship in any person whose principal business is the maintenance or operation of any such ticket office, landing area, hangar, or other ground facility.

Jurisdiction of accounts of noncarriers

(d) Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this chapter, be subject, in the same manner as if such person were an air carrier, to the provisions of this chapter relating to accounts, records, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof.

Investigations of violations

(e) The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision. Pub.L. 85-726, Title IV, § 408, Aug. 23, 1958, 72 Stat. 767; Pub.L. 86-758, § 1, Sept. 13, 1960, 74 Stat. 101.

APPENDIX G

72-4-31
72-4-32

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Docket 23371

ALLEGHENY-MOHAWK MERGER CASE

Decided: March 28, 1972

Merger of Allegheny Airlines, Inc., and Mohawk Airlines, Inc., approved subject to labor protective conditions.

APPEARANCES:

Same as in the examiner's recommended decision and in addition:

Edwin I. Colodny for Allegheny Airlines, Inc.
Charles J. McIntyre for the Air Line Dispatchers Association.
Richard A. Snelling for the State of Vermont.

* * *

Toronto and Montreal.[17]

The Board's decision on the transfer of the certificated international route authority involved herein requires the approval of the President under section 801 of the Fed-

[17] For the reasons stated by the examiner in Appendix 4, we will modify exemption Order E-23845 to permit single-plane service between Toronto and Washington/Philadelphia via Rochester.

eral Aviation Act. No agency of the Government, nor any other party, has suggested that the transfer would raise any issue of adverse effect on our nation's foreign policy or the national defense.[18] On this record we can find no reason relating thereto for disapproving transfer of these international routes or conditioning that transfer in any way. For purposes of simplification, we will combine the surviving carrier's certificates for foreign air transportation into one certificate for route 97F.

VIII.

The Board has a long-established policy of conditioning its approval of air carrier mergers upon acceptance by the surviving company of conditions designed to protect employees.[19] Since the 1961 *United-Capital Merger Case*,[20] the Board has consistently applied the same set of labor protective provisions.[21]

In brief summary, those provisions require that in the case of a merger the surviving carrier must:

(1) Provide for the fair and equitable integration of seniority lists.

(2) In regard to any employee who continues on in the employment of the carrier, pay a "displacement allow-

[18] For the role of Federal agencies in proceedings before the Board involving subsequent Presidential action under section 801, see the letter of the President dated July 16, 1970 attached to Order 70-7-82, July 17, 1970, and the opinion of the Board in the Pacific Islands Local Service Investigation, Order 71-7-174, August 11, 1971, pages 5-6.

[19] Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952); *Cf.* United-Western, Acquisition of Air Carrier Property, 11 C.A.B. 701 (1950).

[20] 33 C.A.B. 307 (1961).

[21] See American-Trans Caribbean Merger Case, Order 70-12-161; Northwest-Northeast Merger Case, Order 70-12-162/163; Universal-American Flyers Acquisition Case, Orders 71-5-80/81.

ance" to that employee for up to four years, to the extent that the employee is "placed in a worse position with respect to compensation" as a result of the merger.

(3) Pay a "dismissal allowance" to any employee who loses his job as a result of the merger. For dismissed employees with 15 years of service with either of the merger partners, payments continue for five years after the discharge; employees with less seniority receive payments for a commensurately shorter period. At the employee's option, a lesser amount can be taken in a lump sum.

(4) Continue, for a stated period, fringe benefits, such as hospitalization insurance, to employees affected by the merger.

(5) Compensate employees who as a result of the merger have to change their place of residence.

(6) Arbitrate disputes with employees arising under the labor protective provisions.[22]

Various union parties have urged the Board in this case, as they have in the past, to make the conditions more favorable to employees adversely affected by mergers. The union parties further urge that the labor protective conditions promulgated under the Rail Passenger Service Act of 1970[23] ("Railpax") and certified by the Secretary of Labor as being "fair and equitable"[24] for purposes of that Act provide a sufficient basis for us to modify the *United-Capital* provisions now.

The examiner in this proceeding and the examiner in the *Delta-Northeast Merger Case* have recommended that

[22] Other United-Capital provisions cover such matters as the period within which a change of employment must occur in order to be compensable.

[23] P.L. 91-518.

[24] Pursuant to section 405 of Railpax.

the Board adopt a number of changes in the *United-Capital* provisions, several of which are along the lines recommended by the union parties.[25] Except for several matters unique to *Delta-Northeast*, we have considered these recommendations concurrently.

We agree with the examiner in *Delta-Northeast* that experience has shown that the conditions dealing with arbitration procedures, set out in section 13, need amendment. But upon review of the parties' contentions, the recommendations of both examiners and the general absence of new facts relating to other conditions, we conclude there is insufficient basis presented herein for altering the substance of any of those conditions. However, we do see the need for some elucidation of the meaning of several provisions.

We turn first to section 13, which is intended to provide a mechanism for settlement by arbitration of disputes arising under the labor protective provisions when they cannot be resolved by negotiation between the parties. In a recent labor dispute growing out of the *American-Trans Caribbean Merger Case*, *supra*, it was necessary for the Board to order the carrier to submit the dispute to arbitration,[26] and then to defend the validity of our order in court.[27] Despite affirmance of our action by the Court of Appeals, several additional months ensued while the parties attempted to choose an arbitra-

[25] The hearings and the issuance of the recommended decisions in this proceeding and in the Delta-Northeast Merger Case (Docket 23315) were nearly contemporaneous. Moreover the evidence and arguments regarding labor protective conditions were very similar in both proceedings. On brief and in oral argument, the labor parties in this proceeding referred to both examiners' recommendations concerning proposed changes in the labor protective conditions.

[26] Order 71-5-30, reconsideration denied, Order 71-6-71.

[27] American Airlines v. Civil Aeronautics Board, 445 F.2d 891 (2nd Cir. 1971), *cert. denied*, —— U.S. ——, 92 S. Ct. 681 (1972).

tor and frame the specific issues to be presented. The time between the failure of negotiations and the commencement of arbitration ultimately ran to about a year. A delay of any kind, much less one of a year's duration, is undesirable because it prolongs disputes and undermines the harmonious labor relations necessary to assure efficient and uninterrupted service to the public. While our orders make clear that either party has the unqualified right to demand arbitration of any *bona fide* dispute of a non-frivolous nature, the aftermath of *American-Trans Caribbean* shows that disagreement over the issues involved or over the selection of the arbitrator can prolong disputes needlessly, to the detriment of employees.

On the basis of this demonstrated experience, therefore, we agree with the examiner in *Delta-Northeast* that the section should be modified to include: (1) a specific provision for an arbitrator and the manner of his selection; (2) expedited hearings and decisions; (3) a definite division between the parties of the arbitrator's compensation and expenses; (4) a right in any party to refer an unsettled dispute to arbitration 20 days after the controversy arises, instead of the present 30 days; and to obviate further dispute and delay, (5) a clear affirmation that the decision of the arbitrator is final and binding on all parties.[28] We will however, make two additional changes beyond those recommended by the examiner. It is possible that the parties to a dispute may determine that some other procedure for submitting a dispute for arbitration would be more satisfactory for them. We shall therefore add a provision to section 13

[28] We do not, of course, intend to deny parties to arbitration proceedings their usual rights to have an arbitration award set aside or corrected, for instance, where the arbitrator exceeded his powers, or where an evident miscalculation of figures was made. *Cf.* 9 U.S.C. secs. 10 and 11.

to provide that the parties may by mutual consent decide upon an alternative procedure appropriate for use in their case. We will also make appropriate language changes to provide for disputes in which there may be more than two parties.

APPENDIX H

72-5-73
72-5-74

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Docket 23315

Served: May 19, 1972

DELTA-NORTHEAST MERGER CASE

Decided: April 24, 1972

Merger of Delta Air Lines, Inc., and Northeast Airlines, Inc. approved, subject to conditions.

APPEARANCES:

Same as in the examiner's recommended decision.

* * *

III.

A number of changes to the Board's standard labor protective conditions have been recommended by the examiner, urged by the labor parties and opposed by the applicants. All the points made by the examiner and the parties here have been considered in connection with the review of all the proposed modifications of the standard labor protective conditions that we undertook in the

Allegheny-Mohawk Merger Case.[37] Our general conclusions concerning changes in the labor protective conditions are set forth in *Allegheny-Mohawk* and will not be repeated here.[38] We will, however, consider several problems raised by the unique circumstances of this case, and which clearly warrant special consideration.

The first such problem concerns the determination of the appropriate cutoff date for purposes of section 10 of the labor protective provisions. Section 10 provides:

> If either carrier, on or after [a specified date] shall rearrange or adjust its forces in anticipation of the merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under this order as an employee immediately affected by the merger, the provisions of this order shall apply to such employee as of the date when he is so affected.

The date usually chosen for inclusion in section 10 is the date of the merger applicants' agreement in principle to merge. Any employee believing

* * *

[37] Orders 72-4-31/32 at pp. 18-33.

[38] Suffice to say that for the reasons and with the interpretations stated there, we shall make no substantive alterations in the standard labor provisions with the exception of condition 13, which relates to procedures for arbitration.

APPENDIX I

Labor Protective Provisions

Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by the proposed merger of Delta Air Lines, Inc. and Northeast Airlines, Inc. approved by the attached order, and it is the intent that such conditions are to be restricted to those changes in employment due to and resulting from such merger. Fluctuations, rises and falls, and changes in volume or character of employment brought about by other causes are not covered by or intended to be covered by these provisions.

Section 2(a). The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.

(b) The term "carrier" as used herein refers to either Delta or Northeast or to the corporation surviving after consummation of the proposed merger of the two companies.

(c) The term "effective date of merger" as used herein shall mean the effective date of the amended certificates of public convenience and necessity transferred to Delta pursuant to the approval granted in the attached order.

(d) The term "employee" as used herein shall mean an employee of the carriers other than a temporary or part-time employee.

Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made

for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.

Section 4(a). Subject to the applicable conditions set forth herein, no employee of either of the carriers involved in the merger who is continued in service shall as a result of the merger be placed in a worse position with respect to compensation than he occupied immediately prior to his displacement so long as he is unable in the normal exercise of his seniority rights under existing agreements, rules, and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him immediately prior to such date, except, however, that if he fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position which he elects to decline.

(b) The protection afforded by the foregoing paragraph is hereby designated as a "displacement allowance" which shall be determined in each instance in the manner hereinafter described. Any employee entitled to such an allowance is hereinafter referred to as a "displaced" employee.

(c) Each displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee and his total time paid for during the last 12 months in which he performed service

immediately preceding the date of his displacement (such 12 months being hereinafter referred to as the "test period") and by dividing separately the total compensation and the total time paid for by 12, thereby producing the average monthly compensation and average monthly time paid for, which shall be the minimum amounts used to guarantee the displaced employee; and if his compensation in his current position is less in any month in which he performs work than the aforesaid average compensation, he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but he shall be compensated in addition thereto at the rate of the position filled for any time worked in excess of the average monthly time paid for during the test period.

(d) The protection afforded herein shall only apply to displacements occurring within a period of 3 years from the effective date of the merger (referred to herein as the claim period); and the period during which this protection is to be given (referred to herein as the protective period) shall extend for a period of 4 years from the date on which the employee is displaced.

Section 5(a). Any employee of either of the carriers participating in the merger who is deprived of employment as a result of said merger shall be accorded an allowance (hereinafter termed a "dismissal allowance"), based on length of service, which (except in the case of an employee with less than 1 year of service) shall be a monthly allowance equivalent in each instance to 60 percent of the average monthly compensation of the employee in question during the last 12 months of his employment in which he earned compensation prior to the date he is first deprived of employment as a result of the merger. This dismissal allowance will be made to

each eligible employee, while unemployed, by Delta during a period beginning at the date he is first deprived of employment as a result of the merger and extending in each instance for a length of time determined and limited by the following schedule:

Length of service Years	Period of payment Months
1 and less than 2	6
2 and less than 3	12
3 and less than 5	18
5 and less than 10	36
10 and less than 15	48
15 and over	60

In the case of an employee with less than 1 year of service such employee shall not be covered by the benefits provided in this section, but shall receive such benefits, and only such benefits, as are provided by section 7.

(b) For the purpose of these provisions, the length of service of the employee shall be determined from the date he last acquired an employment status with the employing carrier and he shall be given credit for 1 month's service for each month in which he performed any service (in any capacity whatsoever) and 12 such months shall be credited as 1 year's service. The employment status of an employee shall not be interrupted by furlough in instances where the employee has a right to and does return to service when called. In determining length of service of an employee acting as an officer or other official representative of an employee organization he will be given credit for performing service while so engaged on leave of absence from the service of the carrier: *Provided*, That in calculating the dismissal allowance for such an employee, such allowance shall be based upon the compensation paid such employee by the carrier during his last 12 months of service on the company payroll and not on the compensation he may have been paid by the employee representative organization.

(c) An employee shall not be regarded as deprived of employment in case of his resignation, death, or retirement on account of age or disability in accordance with the current rules and practices applicable to employees generally, dismissal for justifiable cause in accordance with the rules, or furlough because of reduction in forces due to seasonal requirements of the service; nor shall any employee be regarded as deprived of employment as the result of the merger who is not deprived of his employment within 3 years from the effective date of said merger.

(d) Each employee receiving a dismissal allowance shall keep Allegheny informed of his address and the name and address of any other person by whom he may be regularly employed.

(e) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished while he is absent from service, he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of said position until the regular employee is available for service and thereafter shall revert to his previous status and will be given a dismissal allowance accordingly if any is due.

(f) An employee receiving a dismissal allowance shall be subject to call to return to service after being notified in accordance with the working agreement, and such employee may be required to return to the service of the employing carrier for other reasonably comparable employment for which he is physically and mentally qualified and which does not require a change in his place of

residence, if his return does not infringe upon the employment rights of other employees under the working agreement.

(g) If an employee who is receiving a dismissal allowance returns to service the dismissal allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, however, he shall be entitled to protection in accordance with the provisions of section 4.

(h) If an employee who is receiving a dismissal allowance obtains other employment, his dismissal allowance shall be reduced to the extent that the sum total of his earnings in such employment plus his allowance and any unemployment insurance benefit (or similar benefit) exceed the amount upon which his dismissal allowance is based: *Provided*, That this shall not apply to employees with less than 1 year's service.

(i) A dismissal allowance shall cease prior to the expiration of its prescribed period in the event of—

1. Failure without good cause to return to service after being notified of a position for which he is eligible and as provided in paragraphs (f) and (g).

2. Resignation.

3. Death.

4. Retirement on account of age or disability in accordance with the current rules and practices applicable to employees generally.

5. Dismissal for justifiable cause.

Section 6. An employee affected by the merger shall not during the applicable protective period be deprived of

benefits attaching to his previous employment, such as hospitalization, relief, and the like.

Section 7. Any employee eligible to receive a dismissal allowance under section 5 hereof may, at his option at the time of merger, resign and (in lieu of all other benefits and protections provided in these provisions) accept in a lump sum a separation allowance determined in accordance with the following schedule:

Length of service Years	Separation allowance Months' pay
1 and less than 2	3
2 and less than 3	6
3 and less than 5	9
5 and over	12

In the case of employees with less than 1 year's service, 5 days' pay, at the straight time rate per working day of the position last occupied, for each full month in which they performed service will be paid as the lump sum.

(a) Length of service shall be computed as provided in section 5.

(b) One month's pay shall be computed by multiplying by 30 the calendar daily rate of pay received by the employee in the position last occupied prior to the time of the merger.

Section 8(a). Any employee who is retained in the service of the carrier surviving the merger (or who is later restored to service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger, and is therefore required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects and for the traveling expenses of himself and members of his family, including living expenses for himself and his family and

his own actual wage loss during the time necessary for such transfer, and for a reasonable time thereafter (not to exceed 2 working days), used in securing a place of residence in his new location. The exact extent of the responsibility of the carrier under this provision and the ways and means of transportation shall be agreed upon in advance between the carrier and the affected employee or his representative. No claims for expenses under this section shall be allowed unless they are incurred within 3 years from the effective date of the merger, and the claim must be submitted within 90 days after the expenses are incurred.

(b) Changes in place of residence subsequent to the initial change caused by the merger which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

Section 9(a). The following provisions shall apply, to the extent they are applicable in each instance, to any employee who is retained in the service of the carriers involved in this merger (or who is later restored to such service from the group of employees entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of such merger and is therefore required to move his place of residence.

1. If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the carrier for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the merger to be unaffected thereby; *Provided, however,* That if the home is not sold within a substantial period of time after the merger, then the fair value of the home shall be determined as of a date as closely related to the date of sale as possible, with an agreed-upon adjustment being

made to exclude any effect of the merger on such fair value. The carrier shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other party.

2. If the employee is under a contract to purchase his home, the carrier shall protect him against loss to the extent of the fair value of any equity he may have in the home and in addition shall relieve him from any further obligations under his contract.

3. If the employee holds an unexpired lease of a dwelling occupied by him as his home, the carrier shall protect him from all loss and cost in securing the cancellation of his said lease.

(b) Changes in place of residence subsequent to the initial change caused by the merger which grow out of the normal exercise of seniority in accordance with working agreements are not comprehended within the provisions of this section.

(c) No claim for loss shall be paid under the provisions of this section which is not presented within 3 years after the effective date of the merger.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under contract for purchase, loss and cost in securing termination of lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee or his representative and the carrier, and, in the event they are unable to agree, the dispute may be referred by either party to a board of three competent real estate appraisers, selected in the following manner: One to be selected by the employee or his representative and one by the carrier, respectively; these two shall endeavor by agreement within 10 days after their appointment to select the third appraiser, or to select some person authorized to name the third appraiser;

and in the event of failure to agree, then the Chairman of the National Mediation Board shall be requested to appoint the third appraiser. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the salary of the appraiser selected by such party.

Section 10. If either carrier, on or after April 23, 1971, shall rearrange or adjust its forces in anticipation of the merger, with the purpose or effect of depriving an employee of benefits to which he should be entitled under these provisions as an employee immediately affected by the merger, these provisions shall apply to such an employee as of the date when he is so affected.

Section 11. Delta and Northeast shall jointly or severally give at least 45 days' written notice containing a full and adequate statement of the proposed changes to be effected by the merger, including an estimate of the number of employees of each class, craft, or field of endeavor affected by the intended changes. Such notice shall be posted on bulletin boards or other conspicuous places convenient to the employees of said carriers, and a copy of the notice shall be sent by registered mail to all authorized representatives of any of the employees of both carriers.

If requested in writing by any employee or employees of either carrier or the authorized representative of such employee or employees, the date and place of a meeting between said employees or their representatives and the representatives of the carriers to settle problems of the rearrangement of such employees arising out of and because of the merger shall be agreed upon within 10 days

after such request is received by the carrier. The meeting shall commence within 30 days from the date the request is received by the carrier.

In the event of a failure to agree upon a settlement of a problem or of problems presented at the meeting, the unsettled problems may be submitted by either party for adjustment in accordance with section 13.

Section 12. No employee of either carrier shall, as a condition of eligibility for the protection afforded by the terms of this order be required to accept employment with the surviving carrier that is not within the class, craft, or field of endeavor in which he was employed by either carrier on the date of the attached order.

Section 13(a). "In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination. The parties shall select the arbitrator from such panel by alternately striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties." The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees, or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative

method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above conditions by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties.